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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HERBERT M. COLLINS, *et al.*,
Petitioners,

v.

CITY OF NORFOLK, VIRGINIA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

This is an action challenging at-large city council elections in Norfolk, Virginia, for unlawful dilution of black voting strength in violation of Section 2 of the Voting Rights Act. The District Court, using its own standards for the legal criteria which departed significantly from those mandated by Congress for proving a Section 2 violation, ruled that the proof failed to establish a violation of Section 2. The Court of Appeals, Judge Butzner dissenting, viewed all of the district court's decision as resting entirely upon factual findings subject to the "clearly erroneous" standard of Fed. R. Civ. P. Rule 52(a) and it affirmed the district court's judgment without examining the legal framework by which the trial judge evaluated the facts. In this context, the questions presented are:

1. Whether the Court of Appeals met its responsibility to correct the errors of law that infected both the subsidiary fact-finding and the ultimate judgment of the district court, when it applied the "clearly erroneous" standard of review to all of the issues raised in this case, including challenges to the district court's interpretation of terms and standards in Section 2 of the Voting Rights Act and its legislative history?

2. Whether relief under Section 2 of the Voting Rights Act, as amended in 1982, may be denied because of a district court's view that actions and conditions which Congress stated were highly indicative of a statutory violation had not been brought about "intentionally," when Congress' clear purpose in amending the law was to eliminate any "intent" requirement from Section 2 cases?

3. Whether the Court of Appeals should have reversed as "clearly erroneous" the district court's assertion that there was "no evidence" to support plaintiffs' claim of an attempt to moot this voting discrimination lawsuit by manipulating the election of an additional black city

council member on the eve of trial, since the evidence included highly probative indicia of this claim, including admissions by an important governmental official of probative contemporaneous statements?

4. Whether the Court of Appeals erred in affirming the District Court's judgment denying relief from at-large city council voting based, in part, on the District Court's view that the institution of a ward system in which some wards would be majority black would constitute "segregated voting" and would violate Section 2's proviso that the statute does not establish a right to proportional representation.

LIST OF PARTIES

The Petitioners, plaintiffs in the action below, are: Herbert M. Collins, Dr. Marks S. Richard, Barbara C. Parham, William E. Swindell, Jr., Dr. Milton A. Reid, Julien Hazel, George Banks, and the Norfolk Branch, National Association for the Advancement of Colored People. The Respondents, defendants in the action below, are the City of Norfolk, Virginia; Vincent J. Thomas, Mayor; Dr. Mason C. Andrews, Joseph A. Leafe, Rev. Joseph N. Green, Jr., Claude J. Staylor, Jr., Robert E. Summers, and Mrs. Elizabeth M. Howell, members of the Norfolk City Council; the City of Norfolk Electoral Board; and Paul D. Fraim, Martha H. Boone and Paul M. Lipkin, members of the City of Norfolk Electoral Board. Respondents were sued in their official capicity and are designated according to office held when suit was filed.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	v
Opinions Below	1
Statement of Related Proceedings	1
Jurisdiction	2
Statutes and Rule Involved	2
Statement of the Case	2
Reasons for Granting this Writ	10
Introduction	10
I. Failure to Review District Court Rulings of Law Interpreting the Factors Establishing a Violation of Section 2 of The Voting Rights Act Was Neither Required Nor Justified Under Fed. R. Civ. P. 52 and Presents an Important Issue Upon Which Guidance from this Court is Required	11
II. Without Independent Legal Review, The Court of Appeals Affirmed the District Court's Application of Improper Legal Standards Which Conflict with Decisions of this Court, other Courts of Appeals, and the Legislative History of Section 2	16
A. The Court of Appeals Affirmed Without Comment the Application of An Intent Standard to the Critical Evidentiary Factor of Racially Polarized Voting	16
B. The Court of Appeals Also Affirmed an Intent Standard for the Question Whether the Norfolk City Government was Unresponsive to the Needs of the Black Community	20

TABLE OF CONTENTS—Continued

Page

C. The Court of Appeals Affirmed the District Court's Imposition of Heightened Proof Requirements Not Grounded in the Statute and the Misdefinition of Other Evidentiary Standards 20

1. Slating Process 21

2. History of Official Discrimination 22

3. Discriminatory Election Mechanisms 23

4. Lingering Socioeconomic Effects of Past Discrimination 24

III. The Court of Appeals Failed to Carry Out its Proper Responsibilities Under Fed. R. Civ. P. 52(a) When It Allowed to Stand a District Court Ruling That There Was "No Evidence" Supporting the Claim that the Eve-of-Trial Election of a Second Black to the Norfolk City Council Resulted from Manipulation of the Electoral Process in an Attempt to Moot this Lawsuit 25

IV. The Proper Legal Remedy of District Elections was Erroneously Equated with Proportional Representation and Denied Plaintiffs an Independent Assessment Whether the At-Large System was a Violation of Section 2 of the Voting Rights Act 27

Conclusion 28

TABLE OF AUTHORITIES

Cases Page

Anderson v. City of Bessemer, 470 U.S. ——, 84 L.Ed. 2d 518 (1985) ..... *passim*

Baumgartner v. United States, 322 U.S. 665 (1944) 13

Beer v. United States, 125 U.S. 130 (1976) 18

Bose v. Consumer's Union, 466 U.S. 485 (1984) 15

City of Lockhart v. United States, 460 U.S. 125 (1983) 18

City of Mobile v. Bolden, 446 U.S. 55 (1980) ..... *passim*

City of Petersburg v. United States, 354 F.Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 926 (1973) 18

City of Port Arthur v. United States, 459 U.S. 159 (1982) 18

City of Richmond v. United States, 422 U.S. 358 (1975) 18, 28

City of Rome v. United States, 472 F.Supp. 221 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980) 18, 23

Commissioner v. Duberstein, 363 U.S. 278 (1960) 13

Graves v. Barnes, 343 F.Supp. 704 (W.D. Tex. 1972) (three-judge court) 18

Hathorn v. Lovorn, 457 U.S. 255 (1982) 18

Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982) 15

James v. Ducksworth, 170 F.Supp. 342 (E.D. Va. 1959), *aff'd*, 267 F.2d 224 (4th Cir. 1959) 4

Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984) ..... *passim*

Karavos Compania Naviera, S.A. v. Atlantic Export Corp., 588 F.2d 1 (2nd Cir. 1978) 14

Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 968 (1977) 20

Major v. Treen, 574 F.Supp. 325 (E.D.La. 1983) 18

Manning v. Trustees of Tufts College, 613 F.2d 1200 (1st Cir. 1980) 14

McIntosh County NAACP v. Darien, 605 F.2d 753 (5th Cir. 1979) 21

McMillan v. Escambia County (*McMillan II*), 748 F.2d 1037 (5th Cir. 1984) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Mississippi Republican Executive Committee v. Brooks, —— U.S. ——, 83 L.Ed.2d 313, 105 S.Ct. 416 (1984) 18
Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980) 18
Parnell v. Rapides Parish School Bd., 425 F.Supp. 399 (E.D. La. 1976) 18
Perkins v. City of West Helena, 675 F.2d 201 (8th Cir. 1982), *aff'd mem.*, 459 U.S. 801 (1982) 18
Pullman-Standard v. Swint, 456 U.S. 273 (1982) ..... *passim*
Rawl v. United States, No. 84-2333 (4th Cir., Dec. 4, 1985) 14
Rogers v. Lodge, 458 U.S. 613 (1982) ..... *passim*
Stafos v. Jarvos, 477 F.2d 369 (10th Cir. 1973), *cert. denied*, 414 U.S. 944 (1973) 14
Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976) 14
Thornburg v. Gingles, No. 83-1968 (October Term, 1985) ..... *passim*
United Jewish Organizations v. Carey, 430 U.S. 144 (1977) 17, 18
United States v. Dallas County Commission, 548 F.Supp. 875 (S.D.Ala. 1982), *rev.*, 739 F.2d 1529 (11th Cir. 1984) ..... *passim*
United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 375 (1984) ..... *passim*
United States v. McConney, 728 F.2d 1195 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 101 (1984) 14
United States v. Mississippi, 444 U.S. 1050 (1980) 18
United States v. United States Gypsum Co., 333 U.S. 364 (1948) 25
Washington v. *Finlay*, 664 F.2d 913 (4th Cir. 1981) 23
Whitcomb v. Chavis, 403 U.S. 124 (1971) 18
White v. Regester, 412 U.S. 755 (1973) ..... *passim*
William B. Tanner v. WIOQ, Inc., 528 F.2d 262 (3rd Cir. 1975) 14

TABLE OF AUTHORITIES—Continued

Page

Wood v. Georgia, 370 U.S. 375 (1962) 18
Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) 12, 27

STATUTES:

28 U.S.C. § 1254(1) 2
Voting Rights Act of 1965, 42 U.S.C. § 1973 ..... *passim*

RULES:

Fed.R.Civ.P. 52(a) ..... *passim*

LEGISLATIVE HISTORY:

S. Rep. No. 417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177 ..... *passim*
H.R. Rep. No. 227, 97th Cong., 1st Sess. (1981) 24

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, who are the Norfolk Branch of the NAACP and seven black voters in Norfolk, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on July 22, 1985.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 768 F.2d 572 and are reprinted at App. A. The opinion of the district court is reported at 605 F. Supp. 377 and is reprinted at App. B.

STATEMENT OF RELATED PROCEEDINGS

The principal issues of substantive law in this petition overlap with those presently before this Court in *Thornburg v. Gingles*, No. 83-1968 (October Term, 1985), in which oral argument was held on December 4, 1985. Petitioners respectfully request this Court to defer consideration of the present petition pending the resolution of *Thornburg v. Gingles*.

JURISDICTION

The Court below entered judgment on July 22, 1985, App. E, 83a. On September 13, 1985, the Court of Appeals denied a timely petition for rehearing, App. D, 82a. On November 25, 1985, Chief Justice Burger extended the time for filing this petition to and including January 31, 1986, App. C, 81a. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent parts of Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, and of Rule 52(a), Fed.R.Civ. Pro., are reprinted at Apps. G and H.

STATEMENT OF THE CASE

Norfolk selects its seven-member city council in city-wide, at-large elections for staggered four-year terms. Generally, three council members are elected one year and four council members are elected two years later. (App. 27a.)[1] Norfolk is Virginia's sixth largest city in size, and with a population of 266,979 (1980 Census) is Virginia's largest city in population. As of 1980, blacks made up 35.2 percent of the general population and 31.48 percent of the voting age population (App. 26a). At the time of 1984 municipal elections, an estimated 35.4 percent of Norfolk's registered voters were black (Ex. P-213).

Sixty-five percent of the black citizens of Norfolk are concentrated in 15 of the 55 precincts in Norfolk (Ex. P-158). Of these 15 precincts, 11 are over 90 percent black (Tr. 599). If Norfolk were divided into single-

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[1] "App." refers to the appendix to this petition, "Tr." refers to pages in the trial transcript, "Ex. P-" refers to plaintiffs' exhibits, and "Ex. D-" to defendants' exhibits admitted into evidence at trial.

member districts or wards, blacks would have voting majorities in three of the seven wards (Tr. 670, Ex. P-52).

Despite the fact that Norfolk historically has been approximately one-third black or more, in the half-century between 1918 (when at-large voting was adopted) and 1968, no black person ever was elected to that body (App. 27a). The first black councilman was elected in 1968 but from then until the time this lawsuit was filed, the council never had more than one black member (*id.*). In the May, 1984 city council election, held after this lawsuit was filed and just three weeks before trial, for the first time a second black council member was elected (*id.*).

At trial, plaintiffs presented extensive evidence to establish the existence of each of the factors which Congress, when it enacted the 1982 Amendments to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, declared would support a finding of lack of full access to the political process for minority citizens, in violation of the Act. *See* S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07 [hereinafter cited as S.Rep.].[2] We summarize below some of the evidence on matters which are significant because of the district court's legal errors.

To demonstrate racially polarized voting in Norfolk, plaintiffs established that from 1974 to 1982 the proportion of white votes for all white city council candidates ranged from 89.7 percent to 99.1 percent (Tr. 618-19, Ex. P-179). Votes by whites for all black candidates ranged from 0.9 percent to a high of only 10.3 percent (*id.*). No black candidate for city council has ever been supported by more than 32 percent of white voters. (Tr. 633, Ex. P-183). While black voters have at times backed

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[2] These factors are listed in Judge Murnaghan's majority opinion for the Court of Appeals. App. 7a-8a.

certain white candidates, in the last two elections blacks have overwhelmingly voted for black candidates (67.0 percent and 93.3 percent, respectively) (Tr. 620-21, Ex. P-179).

Kimball Brace, an experienced analyst of voting behavior (Tr. 584-585, Ex. P-46), performed regression analyses of Norfolk city council elections between 1974 and 1982 and concluded that "there is severe and strong racial polarization and bloc voting in the City of Norfolk" (Tr. 638). A second expert, Dr. Richard Engstrom, who is a national authority on minority vote dilution, performed an independent statistical analysis of Norfolk voting and concluded that "voting in Norfolk is racially polarized. . . . Seriously polarized" (Tr. 920). Dr. Justin Green, defendant's main computer expert, admitted that the differences between Mr. Brace's regression results and his own were so small that he used Mr. Brace's figures in his analysis (Tr. 1892), and both of defendants' experts admitted that there was a high correlation between race and voting in Norfolk city council elections (Tr. 1871-72 [Dr. Green]; Tr. 2019-20 [Dr. Timothy O'Rourke]).

Plaintiffs established a history of official discrimination in Norfolk. Black voters had been effectively disenfranchised by the literacy test and poll tax provisions of the Virginia Constitution of 1902 (Va. Const. of 1902, Art. IX § 140), which remained in effect until the Voting Rights Act of 1965, and Norfolk long maintained a dual school system which provided inferior education for black students. When the city's high schools and junior high schools were desegregated by court order, the Norfolk City Council voted to close the integrated schools. *See James v. Ducksworth*, 170 F. Supp. 342 (E.D. Va.), *aff'd*, 267 F.2d 224 (4th Cir. 1959), *cert. denied*, 361 U.S. 835 (1959). As recently as 1981 and 1982, the United States Attorney General had objected under Section 5 of the Voting Rights Act to state legislative reapportionment plans for the Virginia House and Senate,

in part because of the dilution of black voting strength in Norfolk (Exs. P-27, P-28, and P-29). In 1982 the Justice Department objected to at-large voting in Norfolk's multi-member House district because it diluted black voting strength (Ex. P-29); the Norfolk City Council supported the efforts of the Norfolk house delegation to retain this discriminatory multi-member district (Ex. P-11, pp. 73-74; Ex. P-13, p. 80).

Plaintiffs presented evidence that blacks were excluded from a slating process controlled by an all-white "west-side business coalition" (Ex. P-11, pp. 9-21) which a witness for defendants claimed "has maintained a majority on council since I can remember . . ." (Tr. 1672). When asked why a black candidate was not considered by the westside business coalition when they were "looking for somebody to run" with a slate consisting of two whites in 1976, Norfolk's Mayor Vincent Thomas replied that including a black on the ticket "was just not a reasonable political possibility" (Ex. P-11, p.21).

Expert testimony was offered by the plaintiffs which indicated that electoral campaigns in Norfolk were characterized by both overt and subtle racial appeals. For instance, the question of school busing dominated the 1982 city council election and all three white incumbents appealed to white fears and backlash on this issue (Tr. 1134-35, 1183; Ex. P-12, pp. 67-69; Ex. P-40). Additionally, voting in the subsequent election, according to the expert testimony, was polarized along racial lines and corresponded to the candidates' positions on busing. (Ex. P-16, pp. 36-38, Ex. P-187).

Plaintiffs also sought to demonstrate that the election of a second black city council member in 1984 reflected an attempt to manipulate the electoral process so as to thwart their legal challenge to the at-large system. In the 1984 election, which took place after the filing of this lawsuit and immediately prior to trial, the westside business coalition made a decision to run only two candidates in

an election in which there were three open seats (Tr. 1672-73, Tr. 921); in a January 1984 newspaper interview Norfolk Mayor Thomas remarked: "After the election, the issue of black representation may become a moot point" (Ex. P-11, p.101).

Finally, plaintiffs also sought to show that Norfolk's large size in both population and land area, the election of council members for staggered terms, and the absence of any district or ward residency requirement, when seen in conjunction with pervasive racially polarized voting served to "enhance the opportunity for discrimination against the minority group" (S. Rep. at 29).

The District Court Opinion

Despite this evidence, the district court rejected plaintiffs' claim and ruled that the at-large voting system for electing the Norfolk City Council did not violate Section 2 of the Voting Rights Act. The district court either discounted or found against plaintiffs on each of the nine factors which Congress, in enacting the 1982 amendment, regarded as strong evidence to support a finding of a Section 2 violation. *See* S. Rep. at 27-29. For example, the trial judge held that the fact that in two recent elections the turnout rate of black voters had exceeded that of white voters offset the entire history of official discrimination in Norfolk. App. 33a.

The district court rejected plaintiffs' claim that Norfolk city council elections had been characterized by pervasive racially polarized voting by adopting a three-part definition of bloc voting proffered by defendants' expert Dr. Timothy G. O'Rourke. These factors are: "the presence or absence of 'white backlash,'" "the voting patterns of black and white voters over a period of years," and "whether whites attempt to limit the field of candidates." App. 35a-41a. Without reference to either the legislative history or any appellate court decision thus

defining racially polarized voting, the district court expressly embraced this definition because "it more effectively considers voters' *motivations* in selecting particular candidates" (*id.*) (emphasis added).

The district court also rejected plaintiff's evidence of an all-white slating process, basing its conclusion expressly upon a novel definition by Dr. O'Rourke of a slating group as "a permanent or semipermanent organization who [sic] recruits candidates to run for . . . as many seats as are open . . . as a slate." App. 44a. It also rejected plaintiffs' claims that elected officials in Norfolk were unresponsive to the needs of the black community by seeking to excuse historic underrepresentation of blacks in Norfolk governmental employment because other local entities' records were no better (App. 53a-54a) or because of recent recruiting efforts mandated by federal court decrees governing the police and fire departments (*id.*).

The district court rejected claims by plaintiffs that the Norfolk Redevelopment and Housing Authority (NRHA) had not been responsive to the needs of black residents, particularly in its relocation of 1800 black families from their neighborhood, because plaintiffs had failed to establish racial animus as the motivating factor. App. 58a-62a.[3]

Thus, the trial court minimized the significance of plaintiffs' proof either by holding it insufficient to meet an evidentiary burden not grounded in the statute, or by simply denying its existence. Having failed to credit

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[3] The district court also found no racial appeals in city council elections, App. 48a-50a, that there was "no evidence" that the election of a second black city council member after the filing of this lawsuit was an attempt to moot this case, *id.*, determined that Norfolk was "not an unusually large election district" App. 71a, and held that neither the staggered election terms nor the lack of a district residency requirement enhanced the opportunity for discrimination in Norfolk city council elections—despite Congress' recognition that both factors are evidence of a Voting Rights Act violation.

the plaintiffs with establishing *any* of the factors which Congress explicitly identified as substantial indications of discriminatory practices, the district court drew the conclusion that the "totality of the circumstances" failed to show a violation of Section 2 of the Voting Rights Act.

The Court of Appeals' Decision

On July 22, 1985, a divided Court of Appeals for the Fourth Circuit affirmed, Judge Butzner dissenting. App. 83a. The panel majority characterized the issues as "essentially factual" and, applying the standard of review governing findings of fact contained in Fed. R. Civ. P. Rule 52(a), found that plaintiffs had failed to meet their "heavy burden" of showing that the district court's rulings were "clearly erroneous":

> Looking at the facts, as established by the record as a whole and measuring the question presented by the "totality of the circumstances," we simply are not left with a firm conviction that an error has been committed by the district judge . . . [T]he question is . . . whether the district judge to whom the resolution of the factual disputes is finally allocated was clearly erroneous. We cannot say that he was. [App. 8a-9a.]

Because of this standard of review, many of the important legal issues raised by petitioners are not addressed in the majority's opinion. For example, petitioners contended that the district court erred as a matter of law in negating plaintiffs' extensive statistical proof of voting along racial lines in Norfolk council elections, and that the definition adopted by the district court is contrary to the legislative history of Section 2 and existing case law, including decisions of this Court. Yet this issue is not even discussed in the majority opinion.

The dissenting judge recognized that "[t]he principal issues the appellants raise address errors of law to which the clearly erroneous rule does not apply," that the mistakes of law "infected this entire proceeding," and

that "[g]iven the court's misperception . . . judgment against appellants was foreordained." App. 9a-15a (Butzner, J., dissenting).

Judge Butzner would have held that the requirement that plaintiffs in a Section 2 case show "white backlash" and "white attempts to limit the field of candidates," in order to prove racial polarization constituted an error of law "contrary to precedent," citing *Rogers v. Lodge*, 458 U.S. 613, 623 (1982), in which this Court "has recognized racially polarized voting exists when there is 'bloc voting along racial lines.'" App. 14a. Judge Butzner stated that the "additional elements the district court engrafted on the accepted definition of racially polarized voting require *proof of intention to abridge* the minority's voting rights," but because the 1982 Amendment to the Voting Rights Act "eliminated the necessity of proving a discriminatory purpose to establish a [Section 2] violation . . . [t]he district court's interpretation is contrary to the cardinal principle of the 1982 Amendment." App. 14a (emphasis added). (The dissenting judge also found that the district court made this same "error of law" in requiring plaintiffs to prove that the relocation of the approximately 1800 black families in East Ghent "was racially motivated." App. 15a).

Judge Butzner's opinion criticized the district court for "adopt[ing] without the citation of precedent, a restrictive definition of a 'slate,'" App. 14a, and declared that, "[c]ontrary to Supreme Court precedent, the district court held that staggered terms and the lack of residency requirements do not enhance the opportunity for discrimination against minorities." App. 15a. Finally, the dissent found "clearly erroneous" the district court's dismissal of the suspect events surrounding the election of a second black council member in 1984: "[t]he mayor's published statement was a subtle racial appeal, of the type which the Senate Report condemns, for implicitly it appealed to all who opposed the ward system, which was sought by

the NAACP, to vote for the mayor's black candidate." App. 17a.

REASONS FOR GRANTING THE WRIT

Introduction

As in *Thornburg v. Gingles*, No. 83-1968 (pending), this case presents important issues concerning the proper interpretation of the 1982 Amendments to Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Congress acted decisively in 1982 to alter the prior interpretation of Section 2 announced by this Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in order to restore the broad proscription of discriminatory practices which earlier decisions of this Court and the Courts of Appeals had recognized. It is therefore of critical importance that the "new" Section 2 be properly interpreted and applied in order to effectuate the Congressional intent.

Affirmance of the district court's ruling by the court below brings the Fourth Circuit into conflict with the standards of law set forth by Congress in the 1982 Amendments, as well as with rulings of other Courts of Appeals interpreting amended Section 2. The trial court erroneously reintroduced into the Voting Rights Act an "intent" standard for proving several of the key factors which Congress identified as highly probative of a Section 2 violation—in direct contradiction to Congress' central purpose in the 1982 Amendments of removing any "intent" requirement. In addition, the district court disregarded or reformulated other key evidentiary factors despite Congress' explicit endorsement of their significance in the legislative history of the 1982 Amendments.

This petition presents the Court with only the second opportunity to guide the decisionmaking of trial and appellate courts under Section 2. The district court accepted and applied many of the same sorts of arguments for an improperly narrow interpretation of Section 2

which are advanced by Appellants in *Gingles*. But the Court of Appeals' majority declined to review those legal questions. Rather, it treated the case as one involving only factual disputes subject to the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). This Court should, therefore, grant the petition in order to consider and correct the critical legal errors made by the district court in construing the 1982 Amendments to Section 2, as well as to clarify the standard of review.

This Court has a special responsibility, in light of its limited resources, to insure the availability of effective appellate review of trial court rulings on legal questions. Recently the Court has emphasized Rule 52's deferential standard of review of *factual determinations*; but it has correspondingly affirmed that the Courts of Appeals must independently examine trial court *rulings of law*, even those which necessarily channel the subsidiary fact-finding upon which a trial court's ultimate judgment may rest. The failure of the court below to review rigorously the legal standards for establishing a Section 2 violation which were applied by the trial judge, therefore, also warrants review because it presents a recurring question about the division of responsibility and authority between trial and appellate courts that demands the exercise of this Court's supervisory jurisdiction.

I. THE COURT OF APPEALS' FAILURE TO REVIEW DISTRICT COURT RULINGS OF LAW INTERPRETING THE FACTORS ESTABLISHING A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT WAS NEITHER REQUIRED NOR JUSTIFIED UNDER FED. R. CIV. P. 52 AND PRESENTS AN IMPORTANT ISSUE UPON WHICH GUIDANCE FROM THIS COURT IS REQUIRED.

In 1982, Congress amended the Voting Rights Act to provide a remedy for racial discrimination where the "totality of the circumstances" revealed that "the political processes leading to nomination or election in the state or

political subdivision are not equally open to participation by members" of a protected group, and that such "members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice." 42 U.S.C. § 1973. The authoritative Senate Report on the 1982 Amendments identifies many of the criteria to be examined under this "results" test to determine whether there is true equality of political opportunity for the minority community. It adopts standards derived from this Court's decision in *White v. Regester*, 412 U.S. 755 (1973), and lower court rulings applying *White*, including *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

The district court departed from this statutory scheme through its recasting of several of the principal indicia of vote dilution recognized by the Congress, as by introducing an intent requirement to make out a showing of both racially polarized voting and the non-responsiveness of local officials to minority communities, or by sharply limiting the meaning of a "slating organization." That court also committed legal error when it gave no weight to factors which Congress considered important, either by holding they were outweighed by recent episodic occurrences (*e.g.*, voter turnout in last two elections negates history of discrimination) or simply by treating them as insignificant (staggered terms and lack of residency requirements). Petitioners sought to have these manifest errors corrected by the Court of Appeals, but the panel majority failed to review the fundamental errors claimed by petitioners in light of its characterization of the case as implicating only factual determinations subject to deferential review under Fed.R.Civ.P. 52(a).

Whether the majority thought that petitioners' claims were shielded from scrutiny because they guided the lower court's fact-finding, or whether it was applying Rule 52

to its review of legal as well as factual matters, it erred. Because the subsidiary fact-finding of trial courts in Section 2 cases is guided by well established judicial standards which Congress adopted, the failure of the court below to afford effective appellate review to petitioners necessarily raises substantial issues as to the proper construction of the statute which merit review, and some of which are presently being considered by this Court in *Thornburg v. Gingles.*

Review by this Court is also compelled because of the recurring need for clarification and guidance as to the Courts of Appeals' responsibility to afford effective appellate review. In recent years, the Court has acted to restrain the Courts of Appeals from trenching upon the trial judges' superior opportunities to make credibility and evidentiary determinations. *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer*, 470 U.S. ——, 84 L.Ed. 2d 518 (1985). This case presents the other side of the coin—a situation in which the panel majority in effect delegated unreviewed discretion to the trial court to make legal judgments. Although it arises here in the context of a statutory "totality of the circumstances" standard, the issue is the same as that involving "mixed questions" of law and fact, as to which the lower courts remain divided and in need of further guidance.[4] The extent of the confusion over this

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[4] It is easy to state the general rule: the scope of appellate review turns on whether the trial court determination under consideration was factual or legal. Yet, as this Court has recognized, the fact-law distinction is often vexing. *Pullman-Standard*, 456 U.S. at 288; *see also Baumgartner v. United States*, 322 U.S. 665, 671 (1944).

Some prior cases seem to suggest that mixed questions are to be treated like findings of fact (*see, e.g., Commissioner v. Duberstein*, 363 U.S. 278 (1960)), while others appear to favor the thorough review given conclusions of law (*see, e.g., Baumgartner v. United States*). Unfortunately, this Court's decisions provide no litmus test to determine which "mixed questions" are to be treated which way. When the legal component of a mixed question

critical matter of appellate review is best exemplified by comparing the invocation of the clearly erroneous standard in the case at bar with the diametrically opposite conclusion reached by another panel of the Fourth Circuit in an opinion authored by the same judge, Judge Murnaghan:

> Of course, we are aware of the limits placed upon us as an appellate court reviewing a trial court decision. We may not overturn findings of fact unless they are "clearly erroneous." . . . In the case sub judice, however, we find a mistake in the rule of law, or perhaps, a mistake in the application of law to the facts. Characterized in either fashion, the situation permits us to correct the error in the district court.

Rawl v. United States, No. 84-2333 (4th Cir., December 4, 1985), slip op. at 10-11. In spite of this understanding in one context, the Court of Appeals in the present case failed even to address the issues of law raised by plaintiff-appellants.[5]

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is commonplace or ordinary, there is a tendency to apply the "clearly erroneous" standard. When the legal component is technical or uncertain, reviewing courts tend to be more exacting in their consideration. However, the distinction between principles that are common and those that are technical is no more "illuminating" or "self-executing" (to borrow *Duberstein's* terms) than is the distinction between fact and law. *See, e.g., Manning v. Trustees of Tufts College*, 613 F.2d 1200, 1203 (1st Cir. 1980) (applying "clearly erroneous" standard to mixed questions); *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 101 (1984) (standard of review of mixed questions to be determined on case-by-case basis); *Karavos Compania Naviera, S.A. v. Atlantic Export Corp.*, 588 F.2d 1, 7-8 (2d Cir. 1978) (plenary review of mixed questions); *Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976) (same); *William B. Tanner WIOQ, Inc.*, 528 F.2d 262, 266 (3d Cir. 1975) (same); *Stafos v. Jarvos*, 477 F.2d 369, 372 (10th Cir.) (same), *cert. denied*, 414 U.S. 944 (1973).

[5] We recognize that the panel majority wrote that "(t)he issues raised, though sporting various guises, were essentially factual

The proper role of the Courts of Appeals is to afford effective review by making independent determinations of the correctness or error of legal determinations by trial courts, while exercising more deferential review of lower court factual findings:

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous . . . . The Rule does not apply to conclusions of law. The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis.

Pullman-Standard v. Swint, 456 U.S. at 287; *accord Anderson v. City of Bessemer*, 470 U.S. ——, 84 L.Ed. 2d 518, 529 (1985); *Bose v. Consumer's Union*, 466 U.S. 485, 498 (1984); *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n.15 (1982).

It is as important for this Court to ensure that the Courts of Appeals carry out the first part of their responsibilities as it was for the Court to insure that they complied with the strictures of Fed. R .Civ. P. 52(a), *see Pullman-Standard v. Swint*. Review should be granted in this case for that purpose.

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and, in the end, amounted to the assertion that the district judge, in his findings, was clearly erroneous." App. 3a. As described in the succeeding portions of this Petition, the legal issues sought to be raised by Petitioners in the Court of Appeals were straightforward, not disguised, and they go to the very core of the Amendments to Section 2 which Congress enacted in 1982. As Judge Butzner correctly pointed out in his dissenting opinion, after following Justice Powell's admonition in *Anderson* to "engage in a comprehensive review of the entire record,"

> [T]he principal issues the appellants raised addressed *errors of law* to which the clearly erroneous rule does not apply . . . . Because these assignments of error are meritorious, I would vacate the judgment of the district court and remand the case for consideration of the evidence in accordance with correct legal standards. [App. 9a (emphasis added; citation omitted)].

II. WITHOUT INDEPENDENT LEGAL REVIEW, THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT'S APPLICATION OF IMPROPER LEGAL STANDARDS WHICH CONFLICT WITH DECISIONS OF THIS COURT, OTHER COURTS OF APPEALS, AND THE LEGISLATIVE HISTORY OF SECTION 2.

The district court, in its pivotal construction of Section 2 leading to its judgment that plaintiffs proved none of the factors which Congress recognized would tend to establish a statutory violation, made fundamental legal mistakes of two kinds: First, it read an "intent" requirement into the law as to some of the factors. Second, it imposed heightened evidentiary burdens upon plaintiffs or applied incorrect legal standards as to other factors. These errors, if left uncorrected, threaten to undermine the Congressional purpose behind the 1982 Amendments to Section 2—at least in the Fourth Circuit—and require examination by this Court.

A. The Court of Appeals Affirmed Without Comment The Application Of An Intent Standard To The Critical Evidentiary Factor Of Racially Polarized Voting.

The legislative history of the 1982 Amendments makes unmistakably clear that Congress' principal objective was to provide a remedy for electoral schemes that deny minorities an equal opportunity to participate in the political process and elect representatives of their choice without requiring proof of discriminatory intent. S. Rep. at 15-16; *McMillan v. Escambia County (McMillan II)*, 748 F.2d 1037, 1041-42 (5th Cir. 1984). Congress stated that the intent standard asked the "wrong question," was "unnecessarily divisive," and imposed an "inordinately difficult burden of proof" upon plaintiffs. S. Rep. at 36-37.

In direct contravention of Congress' express purpose in amending the Act, the district court crafted an idiosyncratic definition of racially polarized voting which focused

primarily on discriminatory *intent*. Under this homespun definition of racial bloc voting, plaintiffs were required to prove the presence of "white backlash" and "white attempt[s] to limit the field of candidates." App. 35a-41a. The district court reasoned that this novel requirement "more effectively considers voters' motivations in selecting particular candidates." App. 36a. The statistical studies relied on by plaintiffs were found lacking because "in no way can they be said to reflect the rationale behind an individual's selection of a particular candidate." *Id.*[6]

The legislative history of the 1982 Amendments to Section 2 and subsequent case law note the importance of proof of racially polarized voting to a vote dilution claim. S. Rep. at 33; *United States v. Marengo County Commission*, 731 F.2d 1546, 1566-67 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 375 (1984); *Jones v. City of Lubbock*, 727 F.2d 364, 385 (5th Cir. 1984). Racially polarized voting has been defined by this Court simply as "[v]oting along racial lines . . ." *Rogers v. Lodge*, 458 U.S. at 623; cf. *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 n.24 (1977).

The proper legal standards governing proof of racially polarized voting are clear. In the cases decided both under the new Section 2 standard and under the *White v. Regester* standard—which were intended by Congress to

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[6] Under the majority's opinion, the combined reintroduction of intent into the Voting Rights Act and the radical redefinition of racially polarized voting were left unreviewed. As the dissent noted:

> The additional elements the district court engrafted on the accepted definition of racially polarized voting required proof of intention to abridge the minority's voting rights . . . . But in enacting the 1982 amendments to the Voting Rights Act, Congress eliminated the necessity of proving a discriminatory purpose to establish a violation of the Act . . . . The district court's interpretation is contrary to the cardinal principal of the 1982 amendment. (App. 14a.)

govern Section 2 adjudication (S.Rep. at p.23 nn.78, 82, pp. 27-30)—racially polarized voting has been proven by statistical and other proof showing a high degree of association between the racial composition of the voting precincts and the race of the candidates.[7]

None of these cases, nor any of the 14 cases to reach this Court involving proof of racially polarized voting,[8] have required proof of "white backlash" or "white attempts to limit the field of candidates" as necessary or required to show racially polarized voting. The relevant portion of the sole case relied upon by the district court in support of its idiosyncratic definition, *United States v. Dallas County Commission*, 538 F.Supp. 994-05 (S.D.

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[7] *See, e.g.*, Section 2 cases: *McMillan v. Escambia County, supra*, 748 F.2d at 1043; *Marengo County, supra*, 731 F.2d at 1567; *Jones v. City of Lubbock, supra*, 727 F.2d at 380-81; *Major v. Treen*, 574 F.Supp. 325, 337-39 (E.D. La. 1983) (three-judge court); *White v. Regester* cases: *Nevett v. Sides*, 571 F.2d 209, 223 n.16 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980); *Parnell v. Rapides Parish School Bd.*, 425 F.Supp. 399, 405 (E.D. La. 1976), *aff'd*, 563 F.2d 180 (5th Cir. 1978), *cert. denied*, 438 U.S. 915 (1978); *Graves v. Barnes*, 343 F.Supp. 704, 731 (W.D. Tex. 1972) (three-judge court), *aff'd sub nom. White v. Regester, supra*.

[8] *See Mississippi Republican Executive Committee v. Brooks*, —— U.S. ——, 105 S.Ct. 416 (1984), *aff'g, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court) (summary affirmance of district court use of statistical correlations); *City of Lockhart v. United States*, 460 U.S. 125 (1983); *Perkins v. City of West Helena*, 675 F.2d 201, 213 (8th Cir. 1982), *aff'd mem.*, 459 U.S. 801 (1982); *City of Port Arthur v. United States*, 459 U.S. 159 (1982); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Hathorn v. Lovorn*, 457 U.S. 255 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *City of Rome v. United States*, 472 F.Supp. 221, 226 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980); *United States v. Mississippi* and *Henry v. Mississippi*, 444 U.S. 1050 (1980); *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 (1977); *Beer v. U.S.*, 425 U.S. 130 (1976); *City of Richmond v. U.S.*, 422 U.S. 358 (1975); *City of Petersburg v. U.S.*, 354 F.Supp. 1021, 1026 n.10 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Wood v. Georgia*, 370 U.S. 375 (1962).

Ala. 1982), subsequently was reversed by the Eleventh Circuit in a decision which finds racially polarized voting without requiring proof of the additional elements relied upon by the district court. 739 F.2d 1529, 1535-36 (11th Cir. 1984).[9]

Under proper legal standards, the record reveals clear statistical evidence of racially polarized voting. *See supra* pp. 3-4. Thus, the unreviewed errors of law have a critical and immediate impact upon the substantive outcome of this case.

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[9] The scope of the *legal*, not *factual* problem is revealed by the district court's comments during the trial, when it said that the presentation of testimony on voting patterns was a waste of time (Tr. 606), "beating the obvious" (Tr. 631), "overkill" (Tr. 1231), and "absolutely obvious" (Tr. 1232). The Court further stated: "I don't think that Mr. Chappell or Mr. Juren or any of these folks on the city side deny that black precincts by and large support—overwhelmingly support black candidates or that white precincts by and large generally support white candidates . . ." (Tr. 606). Even respondents admitted below that, "the problem, however, was not so much with the appellants' statistics, as with the interpretation of those numbers." Brief for Appellees at 32.

The evidence and testimony at trial established that white city council members were able to get elected with "virtually no black vote" (Tr. 916-918), while blacks "have never elected any candidate without some white support and therefore are very much beholden to the white community." (Testimony of K. Brace, Tr. 640). Such racially polarized voting patterns allow white elected officials to gain office without concern for black interests, while black elected officials "don't always reflect totally the black electorate." *Id.* For example, Rev. Joseph N. Green was elected in 1982 with approximately 30 percent of the white vote, but Mrs. Evelyn Butts, whom defendants' witness Del. William P. Robinson, Jr. termed "a good candidate" (Tr. 1676), received a full 100 percent of the black vote in the 1980 city counsel election and 93.1 percent of the black vote in the 1982 election yet lost both times (Tr. 636, Ex. P-184). In explaining the outcome of the 1982 city council election, white city councilman Summers explained: "People feared Evelyn Butts, that's why they came out and worked. Nobody fears Joe Green" (Ex. P-52, Ex. P-13, p. 66). Cf. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (racial bloc voting "allows those elected to ignore black interests without fear of political consequences").

B. The Court of Appeals Also Affirmed, Without Review, The Use Of An Intent Standard To Evaluate Whether The Norfolk City Government Was Unresponsive To the Needs Of The Black Community.

Parallel to its ruling on racially polarized voting, the district court imposed a requirement of proof of discriminatory intent underlying the lack of responsiveness by white elected officials. *See* App. 60a-61a (housing authority's unresponsiveness held insignificant because "not racially motivated").[10] The dissent by Judge Butzner termed this "a semantic disguise for 'discriminatory purpose' ". App. 15a. *See also Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 149 n. 18 (5th Cir. 1977) (*en banc*), *cert. denied* 434 U.S. 968 (1977) (district court erred by requiring proof of willful unresponsiveness).

C. The Court of Appeals Affirmed the District Court's Imposition Of Heightened Proof Requirements Not Grounded in the Statute and the Misdefinition of Other Evidentiary Standards.

The district court required plaintiffs to meet enhanced evidentiary burdens to establish several of the factors expressly declared probative of Section 2 violations by Congress in the Senate Report on the 1982 Amendments to the Voting Rights Act, in direct contravention of the

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[10] This issue arose most graphically in connection with the City's decision to relocate black low-income families to make way for a white middle-income redevelopment project. Although the district court acknowledged an initial commitment by the city Housing Authority to include some subsidized housing to permit relocated black families to return to East Ghent, that commitment was not fulfilled. The district court refused to find evidence of unresponsiveness since it decided that the decision of the housing authority "was not racially motivated, but rather was motivated by a genuine desire to broaden the city's downtown tax base" App. 61a.

standards set forth in the legislative history of the Amendments.

1. *Slating Process.*

The existence of a white-controlled slating process, according to Congress, constitutes a significant impediment to equal minority participation. S. Rep. at 29. At trial, plaintiffs presented considerable evidence and testimony to support their claim that an all-white "westside businessman's coalition" existed which slated and promoted white candidates only. The district "court [found] that this group does not constitute a slating organization *as defined by Dr. O'Rourke*," App. 44a (emphasis added) and gave this factor no weight in determining whether the "totality of the circumstances" indicated discrimination. Neither the legislative history, nor the pre-1982 case law which it adopts, *see White v. Regester*, 412 U.S. at 767, employs Dr. O'Rourke's definition, however. As the dissent below noted:

> [T]he district court adopted, without the citation of precedent, a restrictive definition of a "slate." The court required the appellants to prove a "permanent or semipermanent organization" which solicits candidates to run for office and puts them up "for as many seat as are open." The legislative history offers no support for this definition . . . . Significantly, courts that have discussed slates or a slating process have not imposed the burdensome requirements initiated by the district court. *See White v. Regester*, 412 U.S. 755, 766-67 (1973); *McIntosh County NAACP v. Darien*, 605 F.2d 753, 758 (5th Cir. 1979). [App. 14a-15a.]

Utilizing the more narrow definition offered by respondents' witness caused the district court to disregard uncontradicted evidence that both current Mayor Vincent Thomas and another white politician were recruited in 1976 by a group of westside white business-

men to serve on a "slate" which they would sponsor and for which they would not consider a black candidate. The district court held that "[a] slate, as defined by Dr. O'Rourke, consists of as many candidates as there are seats available. Accordingly, the Thomas-Phillips ticket could not constitute a slate." 44a-45a.[11] There is nothing in the 1982 Amendments to Section 2, their legislative history or the *White v. Regester* progeny which supports the heightened evidentiary burden which the district court imposed upon the plaintiffs, and based upon which it held that plaintiffs had failed to establish one of the factors Congress declared to be indicative of a Section 2 violation.

2. *History of Official Discrimination.*

The district court correctly found that there had been an extensive past history of official discrimination in Virginia affecting the rights of black Virginians to register and vote (App. 32a-35a). But the court of appeals erred as a matter of law in failing to review according to proper legal standards the district court's conclusions that recent increases in black registration and turnout negated Virginia's past history of discrimination and that "there are no lingering effects of that discrimination which prevent Norfolk's black citizens from participating in the electoral process today" (App. 70a).

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[11] The district court's finding that there was "no evidence, other than the testimony of plaintiffs themselves, that this 'westside businessmen's coalition' is a slating organization," App. 44a, is a clearly erroneous finding of fact. Del. Robinson, a witness for defendants, testified that the all-white westside business coalition "has maintained a majority on council since I can remember . . ." (Tr. 1672). Mayor Thomas testified that he was first recruited to run for city council by this coalition, and that no consideration was given to including a black incumbent on the ticket (Ex. P-11, pp. 9-21). Mayor Thomas testified that "[w]e wanted to have as many things in our favor to get elected as possible" and that including a black on the ticket "was just not a reasonable political possibility" (*id.* at p. 20).

The proof at trial showed continued underrepresentation of blacks on the Norfolk City Council, continued voting along racial lines in the city council elections, continued depressed socioeconomic circumstances for Norfolk blacks, and continued segregated residential patterns, all of which have been held by courts of appeals in other cases to show that the effects of past discrimination continue to persist and directly affect electoral participation by the black minority. *Dallas County Commission*, 739 F.2d at 1537; *Marengo County Commission*, 731 F.2d at 1568; *Jones v. City of Lubbock*, 727 F.2d at 383; *Washington v. Finlay*, 664 F.2d 913, 921 (4th Cir. 1981). Recent court of appeals decisions in other Section 2 cases also have ruled that the absence of significant disparities between white and black voter registration does not negate a finding that "the present political system nevertheless preserves a past lack of access." *Jones v. City of Lubbock*, 727 F.2d at 385; *McMillan*, 748 F.2d at 1045.

3. *Discriminatory Electoral Mechanisms.*

The court of appeals also erred as a matter of law in affirming the district court's conclusions that Norfolk's large size, both in population and land area, the staggered terms rule, and the lack of a district residency requirement do not enhance the opportunity for discrimination in city council elections (App. 71a-72a). This conclusion is contrary to controlling decisions of this Court, *City of Rome v. United States*, 446 U.S. 156, 185 (1980) (staggered terms); *Rogers v. Lodge*, 458 U.S. at 627 (large size of at-large election district; with no residency requirement "[a]ll candidates could reside in . . . "lilly-white' neighborhoods. To that extent, the denial of access becomes enhanced."); *White v. Regester*, 412 U.S. at 766 n. 10 (lack of subdistrict residency requirement); also, *Jones v. City of Lubbock*, 727 F.2d at 383 (staggered terms), and contrary to the legislative history of Section 2 which cites these mechanisms as fac-

tors proving a Section 2 violation, S.Rep. at 29 (large election districts), 143-44 (staggered terms); H.R. Rep. No. 227, 97th Cong., 1st Sess. 18 (1981) (staggered terms). Failure to recognize the rulings of this Court and the findings of Congress that these devices do enhance discrimination in an at-large election system constitutes plain legal error and conflicts with controlling decisions of this Court and other courts of appeals. *See Dallas County*, 739 F.2d at 1535.[12]

4. *Lingering Socioeconomic Effects of Past Discrimination.*

In enacting the 1982 amendment to Section 2, Congress indicated that proof of continued socioeconomic disparities between whites and minorities is an important factor in establishing a Section 2 violation. S.Rep. at 29; *see White v. Regester*, 412 U.S. at 768. The district court found that blacks in Norfolk continue to be disadvantaged in education, income, employment and other areas (App. 46a-47a), but negated this factor because of recent increases in black registration and turnout (App. 69a-70a). The court of appeals erred in affirming this conclusion without independent review according to proper Section 2 legal standards. Under Section 2, socioeconomic disparities show a denial of equal access to the political process without any need to prove a causal

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[12] The proof also showed that each of these devices has a discriminatory impact upon Norfolk City Council elections. Norfolk's large size makes campaigning more difficult for black candidates, who have fewer financial resources than whites (Ex. P-41, Exs. D-70 to 91, Tr. 47-48); defendants' own expert admitted that the staggered terms rule reduces the effectiveness of black voting (Tr. 2088-89) and increases the minimum percentage needed to win, resulting in the defeat of black candidates (Tr. 2093-96; Ex. P-238, Ex. D-470); and because there is no district residency requirement, at the time of trial six of the seven council members came from predominantly-white neighborhoods, five from a small, upper-class, almost all-white westside enclave (Tr. 600-01; Ex. P-48).

nexus between socioeconomic status and black political participation. S.Rep. at 29 n.144; *Dallas County*, 739 F.2d at 1537; *Marengo County*, 731 F.2d at 1567-68.

III. THE COURT OF APPEALS FAILED TO CARRY OUT ITS PROPER RESPONSIBILITIES UNDER FED. R. CIV. P. 52(a) WHEN IT ALLOWED TO STAND A DISTRICT COURT RULING THAT THERE WAS "NO EVIDENCE" SUPPORTING THE CLAIM THAT THE EVE-OF-TRIAL ELECTION OF A SECOND BLACK TO THE NORFOLK CITY COUNCIL RESULTED FROM MANIPULATION OF THE ELECTORAL PROCESS IN AN ATTEMPT TO MOOT THIS LAWSUIT.

While Fed. R. Civ. P. 52(a) commands the Courts of Appeals to show proper deference to the factual findings of trial judges, it commands them equally to reverse judgments when the reviewing court is satisfied they are "clearly erroneous," that is, when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Company*, 333 U.S. 364, 395 (1948). In this case, the district court held that there was "no evidence" that after the filing of this lawsuit, the political process in Norfolk was manipulated to bring about the election of a second black member of the city council in an effort to moot the litigation. App. 51a. The record, however, demonstrates the contrary.

For example, one of the witnesses called by defendants (respondents in this Court) testified that the 1984 city council election in Norfolk was "unique" (Tr. 1672). After the filing of this lawsuit, the leaders of the principal all-white slating group in the city decided not to run a candidate for each of the three city council seats to be filled in the 1984 elections, but to run candidates only for two seats (Tr. 1672-73, 921-22). In the same campaign, Mayor Vincent Thomas, for the first time ever, supported a black candidate who would, if elected, become the second

minority-race council member.[13] Thomas was quoted in a contemporaneous newspaper article—which he confirmed at trial—as saying that "After the election, the issue of black representation may become a moot point" (Ex. P-11, p.101).

The district court made no findings that this testimony and documentary evidence was either not credible or not probative. It was therefore clearly in error in stating that there was "no evidence" to support the plaintiffs' charges, and the Court of Appeals failed to carry out its responsibility to reverse the judgment because of that clearly erroneous fact-finding.

As important as it may be to grant review in order to insure fulfillment of the Court of Appeals' duties under Rule 52, however, it is even more important that this issue be reviewed for the future correct interpretation of Section 2 of the Voting Rights Act. In 1982 Congress specifically warned against finding a minority candidate's recent success at the polls to be "conclusive of a minority

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[13] The sudden turnaround of Mayor Thomas contrasted sharply with his customary penchant for racial campaign appeals, as noted by the dissent. App. 16a-17a. Thus for example, one week before the 1982 elections, Mayor Thomas commented that,

> a failure to curb busing could destroy the political balance of power between blacks and whites in the city.
>
> It's not going to be any advantage to blacks and whites to have our traditional racial makeup altered . . . what does it help the city to change it. (Ex. P-40, Ex. P-11, pp. 53-70).

These comments by Mayor Thomas followed previous published comments by the white candidates for the 1982 city council election that busing would "bring the school system to its knees' and lead to a "breakdown in discipline," "premature retirements of principals and teachers," and "disproportionate numbers of blacks" (Ex. P-40, Ex. P-13, pp. 42-44, Ex. P-14, pp. 41-43). Evidence at trial proved the existence of ongoing subtle and overt racial appeals in opposition to measures overwhelmingly supported by the black community, particularly the issue of public school busing in the 1982 Norfolk City Council election. (Tr. 1183, Ex. P-12, pp. 67-69).

group's access to the political process, [because] we would merely be inviting attempts to circumvent the Constitution." S. Rep. at 29 n.115. In one of the two most important cases pointed to by Congress in the 1982 Amendments' legislative history, the court specifically cautioned that occasional success by minority candidates "might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds." *Zimmer v. McKeithen*, 485 F.2d at 1307.

IV. THE PROPER LEGAL REMEDY OF DISTRICT ELECTIONS WAS ERRONEOUSLY EQUATED WITH PROPORTIONAL REPRESENTATION AND DENIED PLAINTIFFS AN INDEPENDENT ASSESSMENT WHETHER THE AT-LARGE SYSTEM WAS A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

During the trial and in its opinion, the District Court repeatedly interjected its concern with proposed remedies into the determination whether a violation of the Act existed.[14] This improper intermingling of remedial and violation-oriented concerns was a by-product of the district court's incorrect interpretation of the Section 2 proviso: "Provided, that nothing in this section establishes a right to have members of a protected class elected in

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[14] Among the trial judge's repeated references to possible remedies are: his assertion that any ward system ordered into effect would equal a quota system ("So your design, I take it, then is to see that the blacks get a certain quota of people on city council?") (Tr. 821), that ward lines would involve segregated voting ("When you segregate them aren't you creating more problems than you're doing good?") (Tr. 823), and that a ward system would be a "color stockade" (Tr. 824) in which the black vote "will be cooped up in the minority of the wards of the city" (Tr. 825). For even more extensive quotations of the District Judge's repeated interjecting of inappropriate remedial issues see App. 10a-11a (Butzner, J., dissenting).

numbers equal to their proportion in the population." 42 U.S.C. § 1973.

Contrary to the district court's equation of any ward system in which some wards would have a majority of black votes with "proportional political representation," the replacement of an at-large system with a ward system is a time-proven permissible remedy for vote dilution. *See Rogers*, 458 U.S. at 616; *City of Richmond v. United States*, 422 U.S. 358 (1975).[15]

As the dissent stated, "Given the court's misperception of the proviso, judgment against the appellants was foreordained." App. 12a. The district court's equation of remedies removing at-large elections with "proportional representation" parallels the arguments advanced in *Thornburg v. Gingles* and requires clear guidance from this Court.

CONCLUSION

The record in this case demonstrates that blacks in Norfolk have organized behind candidates, have registered to vote, and have faithfully participated in the political process. Neverthcless, the history of electoral outcomes shows that strong candidates marshalling the unified support of the entire black community have been thwarted in their bids for elected office. Given the strong polariza-

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[15] The dissent correctly observed:

> It is wrong to remedy an illegal at-large system by substituting a proportional representation system; but it is not wrong to substitute a fairly drawn ward system even though some wards will have a majority of black voters. On more than one occasion the Supreme Court has approved conversion of a discriminatory at-large system to a ward system. The ward system must be fairly drawn, but if this condition is met, it is no impediment that some wards have predominantly black residents and others have predominantly white residents . . . . [I]n *Rogers v. Lodge*, the Court observed that a minority may be unable to elect representatives in an at-large system, but it may be able to elect several representativse if single-membr districts are established. [Citations omitted.] App. 12a.

tion of voting patterns along racial lines and the presence of racial appeals in campaigns, the consistent electoral defeat of the chosen candidates of over one-third of the electorate to secure meaningful representation on a seven-member city council must be attributed to the structural impediment created by Norfolk's at-large election system. Because of the errors described above, the federal courts have failed to afford petitioners the relief to which they are entitled.

For the foregoing reasons, petitioners respectfully pray that the writ herein be granted and the case be set down for plenary consideration by this Court, or alternatively, that this Petition be held pending announcement of this Court's ruling in *Thornburg v. Gingles*, thereafter granted and the judgment vacated and cause remanded for consideration by the Court of Appeals in light of that decision.

Respectfully submitted,

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85-1300

No. 85-

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HERBERT M. COLLINS, *et al.*,
Petitioners,

v.

CITY OF NORFOLK, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Appendix		Page
A	Opinion of Court of Appeals	1a
B	Opinion of District Court	19a
C	Order of Supreme Court Granting Extension	81a
D	Order of Court of Appeals Denying Rehearing	82a
E	Judgment of Court of Appeals	83a
F	Order and Judgment of District Court	85a
G	Section 2 of the Voting Rights Act of 1965, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134, 42 U.S.C. § 1973 (1982)	86a
H	Federal Rule of Civil Procedure 52(a)	87a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 84-1819

HERBERT M. COLLINS; DR. H. MARKS S. RICHARD; BARBARA C. PARHAM; WILLIAM E. SWINDELL, JR.; DR. MILTON A. REID; NORFOLK BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; GEORGE BANKS; and JULIAN HAZEL,

Appellants,

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; VINCENT J. THOMAS, Mayor; DR. MASON C. ANDREWS; JOSEPH A. LEAFE; REV. JOSEPH N. GREEN, JR.; CLAUDE J. STAYLOR, JR.; ROBERT E. SUMMERS; and MRS. ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM, MARTHA H. BOONE, and PAUL M. LIPKIN, members of the City of Norfolk Electoral Board,

Appellees.

Argued April 1, 1985

Decided July 22, 1985

Rehearing and Rehearing In Banc

Denied Sept. 13, 1985

Frank R. Parker, Washington, D.C. (William L. Robinson, Washington, D.C., Patricia M. Hanrahan; James F. Gay, on brief) for appellants.

R. Harvey Chappell, Jr., Richmond, Va. (Paul W. Jacobs, II, Christian, Barton, Epps, Brent & Chappell, Richmond, Va., Philip R. Trapani, Harold P. Juren, Lydia C. Taylor, Norfolk, Va., on brief) for appellees.

Before MURNAGHAN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

MURNAGHAN, Circuit Judge.

Maintenance by the City of Norfolk, Virginia, of an at-large election procedure covering members of the City Council has led to a suit by the National Association for the Advancement of Colored People and seven black Norfolk voters contending that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 [1] had been violated. The suit also claimed infringement of the Fourteenth and Fifteenth

---

[1] (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Emphasis added).

Amendments through adoption in 1918 of the at-large election as a means to promote racially discriminatory objectives.

The relief sought was replacement with a plan establishing seven single member districts, each with one representative in the City Council, together with a declaration of the illegality of and an injunction prohibiting the at-large system due to an unlawful dilution of black voting strength.

A bench trial lasting ten days and producing over 2100 pages of transcript and more than 590 exhibits resulted in a judgment in favor of the City of Norfolk and its officials joined as defendants, 605 F.Supp. 377. The issues raised, though sporting various guises, were essentially factual and, in the end, amounted to the assertion that the district judge, in his findings, was clearly erroneous. Manifestly, a heavy burden has been assumed on appeal by the parties who were unsuccessful in the district court. *Anderson v. City of Bessemer, North Carolina*, —— U.S. ——, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).[2] Accordingly, we must examine the factual record "in light of the appropriately deferential standard" afforded the district court's findings. *Id.* at ——, 105 S.Ct. at 1514.

Historically, in 1918, provision was made for a five-member City Council, each to be elected at-large. Each was to have a term of four years, with terms to be staggered, presumably to minimize the possible ill-effects

---

[2] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. . . .

—— U.S. at ——, 105 S.Ct. at 1512.

of a 100% turnover, all at the same time. Between 1949 and 1952, the number of councilmen rose to seven. In 1968 a nine-member Advisory Study Commission, one of whose members was black, was created by the City Council to study and evaluate the 1918 Charter. Its report and recommendations appeared in 1971. It unanimously recommended retention of staggered terms and at-large elections, agreeing that "councilmen should be elected by and be responsive to the entire community rather than a portion of it." The Commission also expressed a wish to avoid parochialism, which is another way of saying the same thing.

Since 1968, one member of the City Council has been black, Joseph A. Jordan, Jr. from 1968 to 1977, and Joseph Green from 1977 to the present. Jordan was vice mayor during his terms beginning in 1972 and 1976. Green has been vice mayor since 1982. In 1984, John Foster, another black, was elected to the City Council.[3]

---

[3] A point pressed by the appellants was the asserted existence of a conspiracy to orchestrate Foster's election through the decision, after the institution of this suit, of a white candidate to abandon efforts to obtain reelection. Such interference with the election process would no doubt have been of immense significance to the ultimate outcome of the case, if proven. However, it was obliterated by the district judge's findings, which were not clearly erroneous, that the white candidate's withdrawal was for personal reasons and that his support for election of a second black antedated the filing of the suit. The district judge went on to find that "[t]here is no evidence that the election of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action."

The dissent contends that it was *clearly erroneous* for the district court to conclude that city officials did not attempt to moot the instant lawsuit. To support its contention, the dissent highlights a newspaper article in which the Mayor of Norfolk was quoted as saying, "After the election, the issue of black representation may become a moot point." Whether that published statement which, on its face, amounts to no more than the expression of an opinion by no means necessarily inaccurate, constituted a subtle and improper racial appeal pivoted largely on the credibility of the Mayor's defense of that statement as well as a close factual examination of

Plurality voting governs in Norfolk. Single-shot voting is not prohibited, *i.e.*, casting votes for a full slate is not required.[4] The Norfolk rules impose no numbered place or residency requirements.[5] Since the passage of

---

the general political mood in Norfolk at the time of the City Council election. Thus, we in the panel majority are hardpressed to upset the district judge's conclusion that Foster's election was not promoted for an improper purpose. *See Anderson v. City of Bessemer, supra*, at ——, 105 S.Ct. at 1512.

[4] Although staggered terms can have the effect of frustrating single-shot voting, the district court found that the City of Norfolk adduced sufficient evidence at trial to prove that the staggered terms of the City Council members did not promote "head to head contests between [Blacks] and whites and [did not] deprive [Blacks] of the opportunity to elect a candidate by single-shot voting." *City of Rome v. United States*, 446 U.S. 156, 185, 100 S.Ct. 1548, 1566, 64 L.Ed.2d 119 (1980). The district court noted that, if staggered terms were to have a discriminatory effect upon Norfolk's City Council elections, it would be likely that the elections for the fewest number of seats would not yield any black candidates. Yet the evidence demonstrated that in those elections in which the fewest number of seats—*i.e.*, three—were open for election, a black had always been victorious. In light of such evidence, the district court's findings with respect to staggered terms cannot be deemed clearly erroneous.

[5] There is disagreement over whether residency requirements minimize the voting strength of racial minorities. *See Rogers v. Lodge*, 458 U.S. 613, 627, 102 S.Ct. 3272, 3280, 73 L.Ed.2d 1012 (1982) (Without residency requirement all residents could reside in "'lily-white' neighborhoods"). *Compare Perkins v. City of West Helena*, 675 F.2d 201, 212 (8th Cir. 1982), *aff'd*, 459 U.S. 801, 103 S.Ct. 33, 74 L.Ed.2d 47 (1982) (Ward residency requirement, *inter alia*, effectively prohibited single-shot voting and "enhance[d] the possibility that [City's] election scheme [was] being maintained for a discriminatory purpose"). The lesson to be derived is that any particular aspect of the voting process need not be absolutely good or bad. Rather the application in the particular case should control, and we should eschew generalities. Determining whether residency requirements, or the lack thereof, hinder the position of racial minorities within the electoral process requires a careful factual

the Voting Rights Act in 1965, the black voter registration rate and turnout rate, based on a percentage of the black voting age population, have increased to the point that today they exceed those of Norfolk's white population. White registration is 51.2% of the white voting age population as against 52.9% for the black voting age population. Those figures developed by regression analysis are comparable to 53.1% white and 55.3% black on the homogeneous precinct analysis. Black voter turnout exceeded white voter turnout in the 1984 election. The black turnout rate was 11% higher.[6]

Norfolk's efforts to increase voter registration have been exemplary. In the 1984 election, six staff positions were equally divided, three and three in the main registration office. Of the 371 election officers, 102 were black.

The Concerned Citizens of Norfolk, a black political organization, endorses both black and white candidates and wields considerable clout. From 1972 through 1984, it had endorsed twenty-one candidates for the City Council. Thirteen (62%) have been elected, of whom five were black and eight white.

The municipal work force was 36.16% black in 1973, 41.31% black in 1983. Representation on major boards

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and statistical analysis of the specific political community under scrutiny.

In the instant case, the district court, after considering all of the evidence, concluded that the lack of a ward residency requirement did not enhance the opportunity for discrimination in elections for Norfolk City Council members. That conclusion was amply supported by the record. For example, the record demonstrated that the lack of a residency requirement did not water down the ability of black voters successfully to utilize single-shot voting nor did it result in "lily-white" representation.

[6] Those statistics came from studies introduced in evidence by the appellants. They did not cover the predominantly white residents of naval bases and ships. Had they been included, the statistics would have been even more striking as to black predominance.

and commissions appointed by the City Council has been reasonably good. The parties stipulated that programs and services of the fire department, the library department and the Department of Human Resources did not discriminate against blacks and have been responsive to their needs.

There are other statistics which generally show improvement in the status and circumstances of blacks in Norfolk. The median income disparity ($17,548 for whites, $10,250 for blacks), an endemic problem for the entire United States, has not been demonstrated to be related in any way to the procedures for election to the Norfolk City Council.

In amending in 1982 the Voting Rights Act, Congress called for consideration, in probing the totality of the circumstances, of the following factors:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education,

employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction;

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

[9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.Code Cong. & Ad. News 177, 206-207. Those factors, while generally the most probative, are not exclusive. Congress, through the Senate Committee on the Judiciary, has made clear that at-large elections need not be eliminated. *Id.* p. 211. The test established by the 1982 amendments merely codified pre-existing law. *See, e.g., White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir.1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976).

Looking at the facts, as established by the record as a whole, and measuring the question presented by "the totality of the circumstances," we simply are not left with a firm conviction that an error has been committed by the district judge. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Perhaps, in such detailed and lengthy findings as the district judge made here it is inevitable

that a phrase sprinkled here or there might occasion regret,[7] but the question is not whether we could have done better—a matter necessarily of some uncertainty—but whether the district judge to whom the resolution of factual disputes is finally allocated was clearly erroneous. We cannot say that he was. Accordingly, we affirm.

AFFIRMED.

BUTZNER, Senior Circuit Judge, dissenting.

The principal issues the appellants raise address errors of law to which the clearly erroneous rule does not apply. *Pullman Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). Because these assignments of error are meritorious, I would vacate the judgment of the district court and remand the case for consideration of the evidence in accordance with correct legal standards.

The appellants complain that the district judge denied them a fair trial because of his expressed antipathy to the conversion of an at-large electoral system to a ward system in which some wards would have a predominately black population. In support of their complaint, the

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[7] For example, the dissent contends that the district court, evidenced by his remarks throughout trial, "equated 'proportional political representation' with the institution of a ward system in which some wards will have a majority of black voters." However, the district judge's remarks must be read in the context of a rather long and difficult trial in which he was attempting to comply with the proviso in § 2 of the Voting Rights Act ("*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). Thus, the district court, in contrast to the dissent's assertion, did not conclude, as a matter of law, that ward systems would be violations of that proviso but rather merely attempted to grapple with the interplay between the appellants' desired relief and a statutory prohibition.

appellants emphasize the following comments of the district court during the proceedings:

> Well, aren't you when you're asking for a ward system which will guarantee more blacks on [council], that is a quota system, isn't it?
>
> * * * *
>
> That's the problem I have philosophically and I may be premature in raising it.
>
> * * * *
>
> Well, the real question is whether segregated voting ought to be the rule of the day or integrated voting.
>
> * * * *
>
> If you had a 100 percent black ward, there won't be any white candidates there for blacks to vote for, would there?
>
> See, what concerns me is you are espousing segregated voting, and that really concerns me as a matter of principle.
>
> We're trying to integrate housing, we're trying to integrate schools, we're trying to integrate jobs, we're trying to integrate society so it will work together, and your position is, as a very basic thing, which goes to how we live and how we get along together, and that is the right of franchise, you want to segregate. And that does concern me.
>
> * * * *
>
> So your design, I take it, then is to see that the blacks get a certain quota of people on city council?
>
> * * * *
>
> When you segregate them aren't you creating more problems than you're doing good?
>
> * * * *

> They have voted for successful candidates, both black and white, and isn't that better in an integrated society than putting somebody in a color stockade and say this is the way you're going to do?
>
> * * * *
>
> How is the establishment of a ward system going to correct [racial appeals]? How are you going to bring about a millenium of peace on earth and good will toward men by segregating the white vote and the black vote by establishing a ward system?

The court's characterization of the relief the appellants are seeking pervaded its perception of the entire proceedings. Thus, in the introduction to its opinion, the court wrote in discussing the "Applicable Law":

> Two competing legal principles are applicable in this case. The first is that political systems or practices which deny minority voters access to the political system have been repeatedly struck down by the courts. . . . The second is that courts have consistently rejected the view that any group has a constitutional right to proportional political representation. . . . These competing legal principles are directly involved in this case. (citations omitted)

The appellees respond that the district court was not biased and it did not deny the appellants a fair trial. On the contrary, they say, the concerns raised by the court

> were solely in the context of (1) whether a ward system in Norfolk would, in order to establish appellants' goals, require a quota system contrary to the express provisions of the Voting Rights Act and (2) whether wards in Norfolk would, as a practical matter, end cross-over racial voting patterns and coalition politics which presumably otherwise are to be encouraged.

I do not subscribe to the appellants' complaint of bias. The court's error was not due to prejudice. The error was the court's incorrect interpretation of the proviso found in section 2 of the Voting Rights Act, which states: "Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973. Both the appellees and the district court incorrectly have equated "proportional political representation" with the institution of a ward system in which some wards will have a majority of black voters.

Given the court's misperception of the proviso, judgment against the appellants was foreordained. It is wrong to remedy an illegal at-large system by substituting a proportional representation system; but it is not wrong to substitute a fairly drawn ward system even though some wards will have a majority of black voters. On more than one occasion the Supreme Court has approved conversion of a discriminatory at-large system to a ward system. The ward system must be fairly drawn, but if this condition is met, it is no impediment that some wards have predominately black residents and others have predominately white residents. For example, in *City of Richmond v. United States*, 422 U.S. 358, 372, 95 S.Ct. 2296, 2304, 45 L.Ed.2d 245 (1975), the Court approved the replacement of an at-large electoral system for the city council with a ward system of four wards with a 64% black majority, four wards with a heavily white electorate, and one ward with a 40.9% black population. More recently, approving the conversion of an at-large system to a ward system in *Rogers v. Lodge*, 458 U.S. 613, 616, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982), the Court observed that a minority may be unable to elect representatives in an at-large system, but it may be able to elect several representatives if single-member districts are established.

The appellants do not seek proportional representation. Instead, they seek conversion of an at-large system to

a ward system. Nevertheless, in its discussion of "Applicable Law," the court confused an impermissible "proportional political representation plan" with a permissible ward plan. The court's perception that the relief the appellants sought competed with the rights secured by section 2 of the Voting Rights Act was a mistake of law that infected this entire proceeding. Indeed, the concerns the district court expressed during the trial about the remedy the appellants seek were similar to the views rejected by the Congress when it enacted the 1982 amendments to the Voting Rights Act. *See Gingles v. Edmisten*, 590 F.Supp. 345, 356-57 (E.D.N.C.1984) (three-judge court), *prob. juris, noted, Thornburg v. Gingles*, —— U.S. ——, 105 S.Ct. 2137, 85 L.Ed.2d 495 (1985).

Although the appellants contend that some of the district court's findings are clearly erroneous when tested by the precepts of *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), the primary thesis of their appeal is the commission of errors of law. They assert that the district court erred in applying the criteria prescribed by S.Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad.News 177, 206-207 (hereinafter cited as Senate Report). These criteria were derived from case law and should be interpreted in the light of that law.

One of the most important factors Congress directed courts to consider is the extent to which voting is racially polarized. The district court adopted a definition of polarization that required the appellants to prove "white backlash" and that "whites attempt to limit the field of candidates." In support of this definition, it cited a single case, *United States v. Dallas County Commission*, 548 F.Supp. 875, 904-05 (S.D. Ala.1982). This case, however, has been reversed by a decision that recognized the existence of racial polarization without requiring proof of either additional element. *See United States v. Dallas*

County Commission, 739 F.2d 1529, 1535-36 (11th Cir. 1984).

The definition of polarization the district court applied is contrary to precedent. The Supreme Court has recognized that racially polarized voting exists when there is "bloc voting along racial lines." *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S.Ct. 3272, 3278, 73 L.Ed.2d 1012 (1982). *See United Jewish Organizations v. Carey*, 430 U.S. 144, 166, 97 S.Ct. 996, 1010, 51 L.Ed.2d 229 (1977) (voting following racial lines). *See also NAACP v. Gadsden County School Board*, 691 F.2d 978, 982 (11th Cir. 1982); *City of Rome v. United States*, 472 F.Supp. 221, 226 (D.D.C. 1979) (three-judge court), *aff'd*, 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980).

The additional elements the district court engrafted on the accepted definition of racially polarized voting require proof of intention to abridge the minority's voting rights. This is evident from the Court's insistence that minority complainants prove that "whites attempt to limit the field of candidates." But in enacting the 1982 amendments to the Voting Rights Act, Congress eliminated the necessity of proving a discriminatory purpose to establish a violation of the Act. *See Senate Report* at 27, 1982 U.S.Code Cong. & Ad.News 205. The district court's interpretation is contrary to the cardinal principle of the 1982 amendment.

Another factor deemed important by the Senate Judiciary Committee is a slating process to which the minority has been denied access. To determine whether this factor exists, the district court adopted, without the citation of precedent, a restrictive definition of a "slate." The court required the appellants to prove a "permanent or semi-permanent organization" which solicits candidates to run for office and puts them up "for as many seats as are open." The legislative history offers no support for this definition. It is contrary to the accepted meaning of "slate," which Webster's *Third International Dictionary*

defines as simply "the group of persons proposed for appointment, nomination, or election." Significantly, courts that have discussed slates or a slating process have not imposed the burdensome requirements initiated by the district court. *See White v. Regester*, 412 U.S. 755, 766-67, 93 S.Ct. 2332, 2339-40, 37 L.Ed.2d 314 (1973); *McIntosh County NAACP v. Darien*, 605 F.2d 753, 758 (5th Cir. 1979).

The responsiveness of elected officials to the particularized needs of the members of the minority group is another factor mentioned in the Senate Report. In its inquiry about this subject, the district court required the appellants to prove that the relocation of approximately 1800 black families whose neighborhood was redeveloped for middle-income families was racially motivated. This was an error of law. It bears repeating that minority citizens are not required to prove a discriminatory purpose to establish their rights under section 2 of the Voting Rights Act. Faulty interpretation of the Act is not avoided by requiring proof of "racial motivation," for this term is simply a semantic disguise for "discriminatory purpose."

Contrary to Supreme Court precedent, the district court held that staggered terms and the lack of residency requirements do not enhance the opportunity for discrimination against minorities. *See City of Rome v. United State*, 446 U.S. 156, 185, 100 S.Ct. 1548, 1565, 64 L.Ed.2d 119 (1980) (staggered terms); *Rogers v. Lodge*, 458 U.S. 613, 627, 102 S.Ct. 3272, 3280, 73 L.Ed.2d 1012 (1982) (lack of residency requirements). *See also Jones v. Lubbock*, 727 F.2d 364, 383 (1984) (staggered terms are evidence of violation of Section 2 of the Voting Rights Act). Additionally, staggered terms of office are cited as examples of objective factors of discrimination in both House and Senate reports. H.R.Rep. No. 227, 97th Cong., 1st Sess. 18 (1981); *Senate Report* at 143-44, 1982 U.S. Code Cong. & Ad.News. 315-16.

It is not the function of this dissent to reassess the evidence in light of the correct principles of law. This can be undertaken by the district court on remand. It is enough to note that the district court's judgment is fatally flawed by its erroneous interpretation of statutory and case law and that application of proper legal standards to the evidence could alter the outcome of this litigation.

Nevertheless, a fact the district court omitted in its opinion deserves comment. The keystone of the appellees' defense was the election of a second black councilman in 1984 after this action was commenced. The appellants challenge the significance of this event. They point out that despite a long history of discrimination by city officials, the mayor for the first time supported a second black candidate for council. The appellants emphasize that the mayor publicly stated how the election of the candidate would affect this litigation in which the mayor was a defendant.

Testifying under cross-examination, the mayor admitted that he was quoted correctly in a newspaper article before the election:

> [Plaintiff's attorney]: Now, the next to the last paragraph of that article, "The election of a second black Council member could influence the outcome of an NAACP suit seeking a ward system in Norfolk. The suit contends current at-large elections have prevented blacks from getting fair representation on Council and seeks to establish a ward system. The case is scheduled to be [heard] May 17 in the U.S. District Court.
>
> And then you're quoted here, Mayor, " 'After the election, the issue of black representation may become a moot point,' Thomas said."
>
> Do you agree with that?

> [Mayor]: Yeah, I said that. That's merely an observation. That has nothing to do with my motivation for supporting a black for City Council.

Regardless of his intentions about supporting a black candidate for an unprecedented second seat, the mayor seized on the opportunity of that candidacy to let his constituents know that a favorable vote for the black candidate could moot the issue of black representation, a development, of course, which he favored.

The mayor's published statement was a subtle racial appeal, of the type which the Senate report condemns, for implicitly it appealed to all who opposed the ward system, which was sought by the NAACP, to vote for the mayor's black candidate. The district court did not discuss this episode. Instead, it brushed aside the challenge to the appellees' defense as "innuendo." Without mention of the mayor's public statement about mooting the issue of black representation, the district court found: "There is no evidence that the election of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action."

Whatever the mayor did or did not do to "orchestrate" the black candidacy for a second seat, he certainly promoted it for an improper purpose. The mayor's tactic is not new. It has long been suspect. In a case from which the Senate Judiciary Committee derived the factors it prescribed, *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir.1973), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed. 2d 296 (1976), the court said:

> [W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote . . . .[S]uch success might be attributable to political support motivated by different considerations—namely that

election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds.

Because the evidence discloses that the mayor publicly represented that election of the black candidate, whom he supported, might moot the issue that is at the heart of this action, I cannot accept the notion that the district court's finding was not clearly erroneous.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
NORFOLK DIVISION

Civ. A. No. 83-526-N

HERBERT M. COLLINS, DR. H. MARKS S. RICHARD, BARBARA C. PARHAM, WILLIAM E. SWINDELL, JR., DR. MILTON A. REID, NORFOLK BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, GEORGE BANKS, and JULIAN HAZEL,

Plaintiffs,

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; VINCENT J. THOMAS, Mayor, DR. MASON C. ANDREWS, JOSEPH A. LEAFE, REV. JOSEPH N. GREEN, JR., CLAUDE J. STAYLOR, JR., ROBERT E. SUMMERS, and MRS. ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM, MARTHA H. BOONE, and PAUL M. LIPKIN, members of the City of Norfolk Electoral Board,

Defendants.

July 17, 1984

James F. Gay, Norfolk, Va., Frank R. Parker, Lawyers' Committee for Civil Rights Under Law, Washington, D.C., for plaintiffs.

Philip R. Trapani, City Atty., Harold P. Juren, Deputy City Atty., Lydia C. Taylor, Asst. City. Atty., Norfolk, Va., R. Harvey Chappell, Paul W. Jacobs, II, Christian, Barton, Epps, Brent & Chappell, Richmond, Va., for defendants.

MEMORANDUM OPINION

CLARKE, District Judge.

This matter is before the Court following a nonjury trial which was held on May 21 to June 5, 1984. After hearing the evidence, the Court directed the parties to submit post-trial briefs addressing the factual and legal issues raised. Post-trial briefs have been received, and therefore the matter is now ripe for decision.

The plaintiffs in this action are seven black residents and registered voters of the City of Norfolk, Virginia and the Norfolk Branch of the National Association for the Advancement of Colored People (NAACP). The defendants are the City of Norfolk, the seven members of the Norfolk City Council who were serving when this action was filed, the Norfolk Electoral Board and the three members of the Electoral Board.

The plaintiffs allege that the at-large system of electing members of the Norfolk City Council unlawfully dilutes black voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973. Alternatively, they allege that the at-large system was adopted in 1918 and has been maintained for a racially discriminatory purpose in violation of their Fourteenth and Fifteenth Amendment rights and 42 U.S.C. § 1983.

The plaintiffs seek (1) a declaratory judgment that the at-large system of electing members of the Norfolk City Council unlawfully dilutes black voting strength; (2) an injunction prohibiting the holding of future City Council elections under the at-large system; and (3) the replace-

ment of the at-large system with a plan whereby all seven City Council members would be elected from wards or single-member districts. A motion to certify this action as a class action was denied by Order of February 23, 1984.

I. APPLICABLE LAW

Two competing legal principles are applicable in this case. The first is that political systems or practices which deny minority voters access to the political system have been repeatedly struck down by the courts. *See, e.g., White v. Regester*, 412 U.S. 755, 765-70, 93 S.Ct. 2332, 2339-41, 37 L.Ed.2d 314 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297, 1304-07 (5th Cir.1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1003, 47 L.Ed.2d 296 (1976) (per curiam). The second is that courts have consistently rejected the view that any group has a constitutional right to proportional political representation. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124, 156-57, 91 S.Ct. 1858, 1875-76, 29 L.Ed.2d 363 (1971). These competing legal principles are directly involved in this case.

Section 2 of the Voting Rights Act, as amended in 1982, reads as follows:

> SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class

> of citizens protected by subsection (a) in that its *members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: PROVIDED, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (Supp.1984) (emphasis added).

Congress amended Section 2 of the Voting Rights Act to prohibit electoral practices and procedures that create discriminatory results, even though the responsible governmental body had not installed or maintained the electoral practice or procedure in order to discriminate.[1] In amending the Act, Congress in effect overruled *City of Mobile v. Bolden*, 446 U.S. 55, 66-71, 100 S.Ct. 1490, 1499-1501, 64 L.Ed.2d 47 (1980), in which the Supreme Court held that a claim of denial of access to the political process by a minority group requires a showing of purpose to discriminate. Specifically, the *Bolden* Court held that both in an action based upon the Fourteenth and Fifteenth Amendments and in an action based upon Section 2 of the Voting Rights Act, as originally enacted, the plaintiffs were required to show an intent to discriminate. *Id.* at 62-65, 100 S.Ct. at 1497-1498.

In amending Section 2, Congress sought to remove the requirement that proof of discriminatory intent was necessary to establish a violation of Section 2. *See* S.Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S.Code

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[1] The defendants do not challenge the constitutionality of amended Section 2, which has been held to be constitutional by a number of courts. *See, e.g., Jones v. City of Lubbock*, 727 F.2d 364, 372-75 (5th Cir. 1984); *Major v. Treen*, 574 F.Supp. 325, 342-49 (E.D.La. 1983).

Cong. & Ad.News 177, 179; *see Jordan v. City of Greenwood*, 711 F.2d 667, 668-69 (5th Cir.1983). Congress endeavored to codify the holding in pre-*Bolden* cases, specifically the holding in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). In *White*, the Supreme Court held that to sustain a claim of vote dilution the plaintiffs' burden is:

> to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 766, 93 S.Ct. at 2339.

To establish a violation of Section 2, plaintiffs may show a variety of factors in an attempt to prove their case. The Senate Committee on the Judiciary included a list of typical factors in its report:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; and
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.Code Cong. & Ad. News 177, 206-07.

Two additional factors listed in the Senate Report as having probative value are:

> 1. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
>
> 2. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id.

The factors listed in the Senate Report are similar to the factors articulated originally in *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir.1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1975) (per curiam). In *Zimmer*, the Fifth Circuit listed four "primary" or "principal" factors which should be considered in a vote dilution case. These factors are:

> 1. a lack of access to the process of slating candidates;

2. the unresponsiveness of legislators to the minority's particularized interests;

3. a tenuous state policy underlying the preference for multi-member or at-large districting; and

4. the existence of past discrimination which in general precludes effective minority participation in the election system.

Id. at 1305. The *Zimmer* court also listed four so-called enhancing factors, which tend to support the findings made relative to the four primary factors. These are:

1. the existence of large districts;

2. the existence of majority vote requirements;

3. the existence of anti-single shot voting provisions; and

4. the lack of provision for at-large candidates running from particular geographical subdistricts.

Id.

Both the *Zimmer* case and the Senate Report explicitly state that there is no requirement that the plaintiffs prove that all or even a majority of these factors are present. *Zimmer*, 485 F.2d at 1305; S.Rep. No. 417, 97th Cong., 2d Sess. 29, *reprinted in* 1982 U.S.Code Cong. & Ad. News 177, 207. Rather, courts are to consider the existence, or lack of existence, of these factors in the *Zimmer* court's terms in the "aggregate," or as the language of Section 2 states, based upon the "totality of circumstances." It should be pointed out that the Senate Committee specifically stated that it did not intend that the factors be used "as a mechanical 'point counting' device." S.Rep. No. 417, 97th Cong., 2d Sess. 29 n. 118, *reprinted in* 1982 U.S.Code Cong. & Ad.News 177, 207.

This Court, therefore, will examine seriatim the factors listed in *Zimmer* and in the Senate Report. The Court will make detailed findings of fact with reference to each

factor which the plaintiffs allege is applicable, as required by Rule 52(a) of the Federal Rules of Civil Procedure. The Court is aware of the requirement that it discuss all substantial evidence contrary to its opinion. *See Velasquez v. City of Abilene*, 725 F.2d 1017, 1020-21 (5th Cir.1984). The Court will then weigh the factors and determine whether, "based on the totality of circumstances," the plaintiffs have shown that the political processes leading to the election of the members of the Norfolk City Council "are not equally open to participation" by the black citizens of Norfolk, in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (Supp. 1984).

Should the Court determine that the plaintiffs have failed to prove a violation of Section 2 of the Voting Rights Act, the Court will then consider whether the plaintiffs have proven that their Fourteenth and Fifteenth Amendment rights have been violated. *Bolden* remains the law with regard to constitutional violations. *See Chapman v. Nicholson*, 579 F.Supp. 1504, 1507 (N.D.Ala.1984). The Court will determine whether the plaintiffs have shown that the at-large system was adopted and has been maintained with the intent of discriminating against the black citizens of Norfolk.

II. FINDINGS OF FACT

A. Introduction

According to the 1980 Census, Norfolk has a total population of 266,979 persons, of whom 60.8%, or 162,300, are white, and 35.2%, or 93,987, are black. The 1980 figures show that Norfolk has a total voting age population of 201,366, of whom 64.85%, or 130,595, are white and 31.48%, or 63,396, are black. Norfolk does not maintain voter registration figures by race.

The City of Norfolk currently is governed by a City Council consisting of seven members who are elected by the voters of the City in at-large elections. The sever members of the Council elect the mayor from amongst themselves. Members serve four-year terms, which are staggered. Three seats were at stake in the most recent election, which was held on May 1, 1984. The next election is scheduled for May, 1986, at which time the four remaining seats will be up for election. Elections are held every two years and always occur in even-numbered years.

At-large City Council elections have been held in Norfolk continuously since 1918, when a new City Charter was adopted. The Charter changed the form of City government to a city manager-council form of government.

Since at-large elections were instituted in 1918, three blacks have been elected to the Norfolk City Council. Joseph A. Jordan, Jr. was first elected to the City Council in 1968, and was reelected in 1972 and 1976. He served as vice mayor during his last two terms. When Jordan resigned from his seat on Council as a result of having been appointed a judge, Reverend Joseph N. Green, Jr. was appointed to fill Jordan's unexpired term. Rev. Green was elected to the City Council in 1978 and again in 1982. He has served as vice mayor since 1982 and was recently reelected to that office. The third black, Reverend John Foster, won a seat on the City Council in the May 1, 1984 election. Accordingly, for the period of July 1, 1984 through June 30, 1986, the seven-member Council will have two black members, Rev. Green and Rev. Foster.

B. History of the Adoption of the At-Large System

The plaintiffs' historian, Dr. Peyton McCrary, and the defendants' historian, Dr. Peter Stewart, each presented

their view of the history which preceded the adoption of at-large elections in Norfolk in 1918. The Court will briefly review that history, much of which is not in dispute.

The City of Norfolk received its Charter from the Crown and was incorporated as a borough in 1736. In 1845, Norfolk was incorporated as a city by the Virginia General Assembly. From 1816 to the present, the City Charters have provided for the at-large election of various municipal officers. The 1845 City Charter provided for a bicameral city council, consisting of the Common Council, which was elected at-large, and the Select Council, which was selected by the Common Council from amongst its own members. In 1873, the City Charter was amended to provide for the election of members of the Common Council from wards. The members of the Common Council continued to appoint the members of the Select Council. The mayor continued to be elected at-large.

In 1882, the Virginia General Assembly adopted a new charter for the City of Norfolk, which provided for the election of the Common Council members from wards and the at-large election of the Select Council. The mayor was still to be elected at-large. Thereafter, control of the General Assembly changed hands, and in 1884 a new Norfolk Charter was adopted, which was identical to the one adopted in 1873.

As a result of the adoption of the Virginia Constitution in 1902, which provided for a literacy test and a poll tax, most blacks and some whites were effectively disenfra hised. As a result of the imposition of these measures, black voter registration in Norfolk declined from 1,826 in 1900 to 504 in 1902. White voter registration also declined, from 6,732 in 1900 to 4,698 in 1902. The number of registered black voters, according to the State poll tax records for the City of Norfolk, fluctuated during the next fifteen years. The 1911 annexation of

Huntersville, a predominantly black area, from Norfolk County resulted in an increase from 38 to 154 registered black voters in that year. White voter registration also fluctuated during the period.

In 1906, the Virginia General Assembly adopted a new Norfolk Charter, which provided for the election of a Common Council of not less than fourteen nor more than forty members and a Board of Aldermen of not less than eight nor more than thirty members, each to be elected from wards. A three-member Board of Control, with combined legislative and administrative powers, was to be elected at-large. City officers, such as the Commonwealth's attorney, commissioner of revenue and city treasurer were to be elected at-large.

Efforts toward municipal reform were begun in Norfolk in 1913, by members of the Citizens Party, a group whose prime concerns were religion and morality. The black citizens of Norfolk were often associated with the Citizens Party. Members of the Norfolk Chamber of Commerce, which favored the adoption of a city manager form of government, were also aligned with the Citizens Party.

In August, 1915, the issue of whether to create a charter commission to study the adoption of a city manager form of government was submitted to Norfolk's voters. The measure was supported by a majority of those voting, but failed because it was not approved by a majority of all registered voters, as required by State law. The 1915 referendum had the support of the Norfolk Chamber of Commerce and the Citizens Party.

No further efforts for a new charter occurred until 1917, when State law was changed to allow voter approval of a charter change by a majority of the votes cast instead of by a majority of registered voters. In June, 1917, Norfolk's voters approved the establishment of a charter study commission. The Charter Commission is-

sued the proposed charter in September, 1917, which provided for a city manager form of government and the at-large election of a small city council. A referendum on the adoption of the new charter was set for November 20, 1917.

The main dispute between the plaintiffs' and defendants' historians concerns the interpretation to be accorded a series of advertisements which appeared in *The Virginian-Pilot* newspaper in the days before the election. The plaintiffs' expert, Dr. McCrary, conceded that but for the appearance of these advertisements, he "would have found it easier to believe that the race issue did not surface." (Tr. 412). The Court is of the opinion that prior to November, 1917, race was not an issue in the charter change campaign.

The issue of race was first raised by opponents of the charter change on November 9, 1917, according to newspaper accounts. They charged that the new charter would increase the political power of blacks because of the abolition of the white primary. The first advertisement raising the issue of race appeared in *The Virginian-Pilot* on November 13, 1917, seven days before the referendum. In that advertisement, headlined "The New Charter a Danger to White Supremacy," the opponents of the charter change claimed that passage of the charter would result in the qualification to vote of "nearly 2,000 Negro men." (Plaintiffs' Exh. 43). The opponents of the charter change repeated many of the same allegations in a November 16, 1917 advertisement entitled "White Supremacy."

The proponents of the new charter responded to the opponents' allegations in a November 17, 1917 advertisement headline "Don't Let The Bosses Play Upon Your Sentiments." (Plaintiffs' Exh. 43). In the advertisement, the proponents argued that the issue of white supremacy and the black vote was irrelevant because the

state qualifications for voting would remain the same under the 1902 Constitution. They repeated this argument in a November 19, 1917 advertisement.

After reviewing these advertisements, the Court adopts the view of defendants' expert, Dr. Stewart, that the issue of race was first raised by the opponents of the new charter and that the proponents of the new charter attempted to convince the voters that the real issue was efficient local government, not "the colored question." (Plaintiffs' Exh. 43). The charter proponents tried to convince the voters that the charter opponents were trying to distract them from the real issue, that is, whether a city manager form of government would be more effective.

On the date of the referendum, November 20, 1917, the state poll tax records show that approximately 360[2] blacks and approximately 7,910 whites were registered to vote in Norfolk. Based on these figures, blacks constituted just over 4% of the Norfolk electorate. In the most identifiably black precinct in the City, in Huntersville, there were between 100 and 200 blacks qualified to vote in the charter referendum. The voters in that precinct approved the new charter by a vote of 121 to 32.

In 1918, the Virginia General Assembly adopted the new Norfolk City Charter. It provided for a five-member City Council, whose members were to be elected at-large for four-year terms. The terms were staggered such that three seats were to be filled during one election and the remaining two seats would be filled in an election two years later. The city manager was to be appointed by the Council. The mayor was to be elected from amongst the Council members.

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[2] According to the plaintiffs' expert, Dr. McCrary, there were 361 blacks registered to vote on the day of the referendum. The defendants' expert, Dr. Stewart, cites a figure of 358. The Court has therefore used an approximate figure of 360.

C. The At-Large System To Date

In 1949, the Norfolk City Council agreed unanimously to recommend to the Virginia General Assembly that the numbers of seats on the Council be increased from five to seven. According to the November 9, 1950 *Virginian-Pilot* article reporting passage of the referendum raising the Council membership to seven, black voters were "greatly in favor of the change." (Defendants' Exh. 38). The first election to a seven-member Council occurred in 1952.

In 1968, the City Council adopted a resolution which created an Advisory Study Commission to study and evaluate the Norfolk Charter of 1918. The Commission, after much deliberation and consideration of public comments, issued its report on November 3, 1971. The nine-member Commission unanimously recommended the retention of the at-large system for election of the members of Council because "councilmen should be elected by and be responsive to the entire community rather than a portion of it." (Defendants' Exh. 44). The report added that the "Commission wishes to avoid the dangers of a ward or district system which might encourage councilmen to look after the interests of their own district at the expense of the overall interest of the entire City." (Defendants' Exh. 44). Edward Delk, a black attorney, was a member of the Commission. He testified at trial that he continues to favor retention of the at-large system.

The 1918 Norfolk Charter continues to be in effect today.

D. Extent of History of Official Discrimination

The early history of Virginia demonstrates efforts to defeat black participation in electoral politics. Black voters were effectively disenfranchised as a result of the 1902 Constitution, which imposed the literacy test and

poll tax. The literacy test remained in effect until passage of the Voting Rights Act in 1965. The poll tax was declared unconstitutional by the Supreme Court in 1966. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). Blacks were also precluded from participating in the primary elections of the Virginia Democratic Party by the "white primary" rule which went into effect in 1912. The "white primary rule" was declared unconstitutional by the United States Court of Appeals for the Fourth Circuit in 1930. *Bliley v. West*, 42 F.2d 101 (4th Cir.1930).

Prior to the passage of the Voting Rights Act in 1965, black voter registration in Norfolk was proportionately lower than that of whites. In 1960, for example 50% of the white voting age population was registered to vote while only 25.3% of the black voting age population was registered. By October, 1964, black registration had increased to 35% of the black voting age population, while white registration had decreased to 46% of the white voting age population.

Since the passage of the Voting Rights Act in 1965, the black voter registration rate and turnout rate, based on a percentage of the black voting age population, has increased to the point that today it exceeds that of Norfolk's white population. Currently, the black voter registration rate, based on a percentage of the black voting age population, exceeds that of whites, whether one looks at the figures offered by the plaintiffs' experts or at those offered by the defendants' experts. The plaintiffs' figures show a white registration rate of 51.2% of the white voting age population and a black registration rate of 52.9% of the black voting age population under regression analysis. Under the plaintiffs' homogeneous precinct analysis, the white registration rate is 53.1% of the white voting age population and the black registration rate is 55.3% of the black voting age population.[3]

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[3] These figures exclude the population on Norfolk's Naval bases or ships home ported in Norfolk. This excluded population is pre-

The black voter turnout rate, based on a percentage of the black voting age population, also currently exceeds that of white voters. The plaintiffs' figures show that the black turnout rate, based upon a percentage of the black voting age population, exceeded the white turnout rate in both the 1982 and 1984 City Council elections. In the May 1, 1984 election, the plaintiffs' figures show that the black turnout rate exceeded the white turnout rate by 11%.[4]

The City has made extensive efforts to increase voter registration and to make the registration process more accessible. According to the City's General Registrar, Ann Washington, as of May 31, 1984, there are twelve satellite voter registration offices located throughout the City of Norfolk. At least seven of these twelve satellite offices are located in or adjacent to predominantly black areas. In addition, the City applied for and received blanket coverage permission from the Department of Justice under Section 5 of the Voting Rights Act to conduct voter registration drives. Such registration drives have been conducted at food stamp distribution centers, the Division of Motor Vehicles, high schools and multi-service conters.

The Court finds that despite an early history of discrimination in Virginia against blacks in terms of their ability to participate in the electoral process, Norfolk's black citizens today participate in the electoral process

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dominantly white and has a low voter registration rate. Inclusion of this military population would result in a white registration rate of 37% of the white voting age population and a black registration rate of 57% of the black voting age population under regression analysis, according to the defendants.

[4] Again, the plaintiffs' figures exclude the predominantly white military population. Inclusion of this population would show a black turnout rate, based on a percentage of the black voting age population, three times higher than that of whites in the 1984 election, according to the defendants.

equally with white citizens. The procedures and facilities of the Registrar's Office are fair and equally accessible to all of Norfolk's citizens.

E. Racial Polarization

The plaintiffs and the defendants each offered their own definitions of "racially polarized voting." The plaintiffs' expert, Dr. Richard Engstrom, opined that racially polarized voting occurs when the majority of one racial group votes contrary to the majority of another racial group. The defendants' expert, Dr. Timothy G. O'Rourke, suggested that three factors must be examined in order to determine whether racially polarized voting has occurred. First, the presence or absence of "white backlash," that is, whether white voters turn out in greater numbers than usual in response to the potential election of black candidates. Second, the voting patterns of black and white voters over a period of years. Finally, whether whites attempt to limit the field of candidates.

The Court rejects the definition of racially polarized voting offered by Dr. Engstrom in favor of that presented by Dr. O'Rourke. Under Dr. Engstrom's definition, most of the elections in this country, including Presidential elections, would be characterized as racially polarized. For example, as Dr. Engstrom conceded, black voters consistently and overwhelmingly support Democratic Presidential candidates. In addition, Dr. Engstrom's definition would be more appropriate in a head-to-head race than in an election such as that for the Norfolk City Council in which a voter may select more than one candidate. A vote for one candidate is not necessarily a vote against another candidate.

The Court is of the opinion that the definition offered by Dr. O'Rourke is a more sensible one. It is more applicable to the multiple-candidate, multiple-office Norfolk City Council elections. It is not overly broad, as is Dr.

Engstrom's definition. Additionally, it more effectively considers voters' motivations in selecting particular candidates. Furthermore, Dr. O'Rourke's definition is consistent with the definition adopted by those few courts which have discussed the definition of racially polarized voting. *See, e.g., United States v. Dallas County Commission*, 548 F.Supp. 875, 904-05 (S.D.Ala.1982). The Court will therefore employ Dr. O'Rourke's definition in determining whether the Norfolk City Council elections may be characterized as racially polarized.

1. *White Backlash*

Norfolk's white voters have not turned out in greater numbers than usual in response to the potential election of black candidates. For example, in the 1984 election there were two strong black candidates, Rev. John Foster and Evelyn Butts, yet the percentage of white registered voters who turned out to vote was substantially lower than the percentage of black registered voters who turned out to vote. As a matter of fact, the 1984 turnout rate for whites, as a percentage of the white voting age population, was lower in 1984 than in any of the three previous elections. The plaintiffs' expert, Dr. Richard Engstrom, conceded that he found no evidence of white backlash.

2. *Voting Patterns*

Since the City does not maintain voter registration or turnout figures by race, statistical estimates of voting behavior were used by both the plaintiffs and the defendants. Such statistical estimates are subject to a variety of interpretations and can obviously be manipulated to support the desired result. An additional problem with these statistical estimates is that they are limited to raw numerical data, and in no way can they be said to reflect the rationale behind an individual's selection of a particular candidate.

The plaintiffs rely on two statistical studies, one prepared by Carl Peterson and Kimball Brace ("the Brace report")[5] and one prepared by Dr. Richard Engstrom, to prove that voting in Norfolk City Council elections is racially polarized. These two statistical analyses employed data consisting of the number of registered voters in each precinct, the number of votes cast for each candidate in each precinct, and the racial composition of each of the City's 54 precincts, as determined from the 1980 Census maps. Neither of the plaintiffs' experts' studies considers factors other than race which may greatly influence voting behavior. These factors include a voter's age, ethnicity, education and income. Other factors which may influence voting behavior include incumbency, campaign expenditures, endorsements and name recognition. None of these factors were considered in the Brace report or Dr. Engstrom's report.

That these facts are relevant becomes clear if one examines, for example, the effect of incumbency on City Council elections. An examination of the elections from 1968 through 1984 shows that the incumbency success rate is over 79% In four of the nine elections, every incumbent who sought reelection was reelected. Since 1974, every black incumbent who has sought reelection has been reelected. There is a high correlation between incumbency and election to the City Council. Yet, the plaintiffs, while admitting that incumbency plays a role in City Council elections, failed to adjust their figures to account for this factor.

Without going into great detail, the Court is convinced that the Brace report and Dr. Engstrom's report contain a number of methodological problems which cause the Court to doubt the credibility of the reports. Primary among these are the exclusion from both the Brace and

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[5] In referring to the Brace report, the Court refers to the third and final study prepared by Peterson and Brace, Plaintiffs' Exhibit 50-B.

Engstrom reports of those residing on Naval bases within the City limits or stationed aboard ships home ported in Norfolk. These individuals are eligible to register to vote in Norfolk City Council elections. This military population is included in the 1980 Census figures for Norfolk, and was included by the General Assembly of Virginia in the drawing of district lines for the election of the members of the Virginia Senate and House of Delegates, the State legislative bodies.

The plaintiffs' experts' reason for excluding this military population is that they are largely unregistered to vote and do not participate in City Council elections. Yet, the plaintiffs inexplicably included the City's student population, despite the fact that students also tend to be inactive members of the electorate. In addition, the plaintiffs' experts included in their studies the over 11,000 military personnel living off the Naval bases in private homes in the City.

The Court is convinced that this military population was excluded because of the effect of its exclusion on estimates of white voter participation. The racial composition of this excluded population is 84.5% white and 15.5% black, according to the 1980 Census data. Of the 33,892 members of the excluded military population who are of voting age, 84.3% are white and 15.7% are black. Exclusion of this population would have the effect of increasing white voter registration and turnout figures and, consequently, of decreasing black voter participation figures, as Dr. Brace conceded. The Court is of the opinion that the exclusion of these 33,892 potential voters in the plaintiffs' experts' studies improperly skews the results of their studies.

A second methodological problem with the plaintiffs' experts' reports was their inclusion of the so-called "other population" in with the figures for the white population when preparing and analyzing the data. This "other" population amounting to between three and four percent

of Norfolk's population, includes Asians, Native Americans and others. In other words, the plaintiffs' experts included all non-blacks in their definition of whites. The plaintiffs' experts' reports purport to compare white and black voting behavior, yet they include non-white voters within the white category. This results in an increase in the number of white registered voters and in the white voter turnout in comparison to that of black voters.

The defendants relied on the testimony of Dr. Timothy G. O'Rourke and Dr. Justin G. Green to support their contention that voting in Norfolk City Council elections is not racially polarized. Dr. O'Rourke, in contrast to the plaintiffs' experts, considered such factors as endorsements and campaign expenses in reaching his conclusions. Drs. O'Rourke and Green avoided the methodological problems which the Court believes the plaintiffs' experts' studies suffer from. They did not exclude the military population from their analyses, nor did they include the "other" population in their studies. In addition, they went beyond the election figures, and studied newspaper articles and other data in reaching their conclusions. The Court attaches greater weight to the analyses of the defendants' experts Drs. O'Rourke and Green than to the studies of the plaintiffs' experts Drs. Engstrom, Brace and Peterson, finding them to be more credible and persuasive.

The Court's review of these studies and analyses leads it to conclude that the voting patterns reveal a substantial crossover vote. For example, in the 1978 election, 32.2% of the white voters supported Rev. Joseph N. Green, Jr. in his first election. In 1982, Rev. Green received the support of 31.1% of the white electorate. In 1984, Rev. John Foster was supported by 26.6% of the white voters. These figures show a willingness by white voters to cross racial lines when voting in City Council elections. The Court also notes that a substantial number of black voters have shown a willingness to vote for white candidates, particularly in the elections of Elizabeth Howell in 1974,

1978 and 1980, in which she received the support of a majority of black voters.

Further study of the election results reveals the importance of coalition politics in Norfolk City Council elections. Both plaintiffs' and defendants' experts agree that none of the three winning candidates in 1984 would have been elected without the support they received from both black and white voters.

The Court's review of the studies also shows that a number of unsuccessful black candidates failed to receive the support of even a majority of black voters. For example, in 1984, two black candidates, Theodore Hall and Joseph Rose, received only 8.9% and 18.7% of the votes cast by blacks, respectively. In 1982, black candidates Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs, were supported by only 27.5% and 29.6% of the black voters, respectively. In the 1980 election, George H. Banks, a plaintiff in this lawsuit, received only 34.5% of the votes cast by black voters. Another of the plaintiffs in this action, Dr. Milton A. Reid, received the support of only 36.4% of the blacks voting in the 1974 election. These black candidates were obviously not the candidates of choice of the black voters in those elections.

Between 1974 and 1984 there have been sixteen black candidates for the Norfolk City Council. Four of those candidates have been elected. Eight of the remaining black candidates failed to receive the support of even a majority of the black electorate. The remaining four black candidates are actually only two individuals: Evelyn T. Butts in 1980, 1982 and 1984, and Lenious G. Bond in 1972. Mrs. Butts would most likely have been elected in 1984 had she received the same level of black support she received in her earlier races, which dropped from a high of 92.9% in 1980 to 72.1% in 1984.

The Court also finds, as the parties agree, that the current rate of black voter registration and turnout is

proportionately higher than that of the white population. One would expect the opposite to be true under a racially polarized voting system with a majority of white voters. After thoroughly reviewing the voting behavior studies presented by the plaintiffs and defendants, the Court finds that the voting patterns in Norfolk City Council elections do not reflect racial polarization.

3. *Efforts to Limit the Field of Candidates*

The field of candidates in City Council elections since 1968 has ranged from eight in 1968, when three seats were available, to twenty-one in 1974, when four seats were available. In the most recent election, held May 1, 1984, ten candidates sought to fill three seats on the Council. For the elections which were held from 1968 through 1984, the average number of candidates per election was thirteen.

The evidence fails to disclose any effort on the part of whites to limit the field of candidates and the statistics support this conclusion. There was no evidence offered to suggest that any individual who desired to seek a position on the City Council was prevented or even dissuaded from doing so.

4. *Summary*

In summary, the Court finds no evidence of white backlash. The Court further finds that a thorough examination of the voting behavior of Norfolk's black and white voters fails to reveal a racially polarized electorate. Finally, the Court finds no evidence of efforts by whites to limit the field of candidates. Applying Dr. O'Rourke's definition of racially polarized voting, the Court concludes that voting in Norfolk City Council elections is not racially polarized.

F. Enhancing Factors

1. *Existence of Unusually Large Election Districts*

Under the at-large system, the election district obviously consists of the entire fifty-three square mile City. The Court is not convinced, however, that the size of the election district, that is of the City, enhances the opportunity for discrimination against black residents. Although the plaintiffs allege that it would be easier and less costly to run for the City Council under a ward system, they presented no statistical evidence to support this contention. It is conceivable that there would be no decrease in the cost of running for City Council under a ward system because head-to-head competition may in fact cause costs to escalate.

2. *Majority Vote Requirements*

There is no majority vote requirement in Norfolk City Council elections. Council members are elected by a plurality of the votes cast, regardless of whether they have received a majority of the votes cast. In fact, in every City Council election from 1968 through 1984, the candidate with the lowest total vote of those elected has received less than 50% of the vote. Four of those candidates with the lowest winning total received less than 45% of the votes cast.

3. *Anti-Single-Shot Provisions*

There are no prohibitions against casting single-shot ballots in Norfolk City Council elections. In fact, the evidence shows that black voters have on occasion successfully employed single-shot tactics.

4. *Staggered Terms*

The members of the Norfolk City Council serve staggered four-year terms. Generally, four seats are filled in one election and three seats are filled in the following

election. In two of the nine elections held since 1968, however, more than four seats were up for election. Six seats were available in 1970 and five seats were available in 1978, due to vacancies on the Council.

The plaintiffs allege that staggered terms increase the likelihood of head-to-head racial contests and minimize the effect of single-shot voting. If, as the plaintiffs allege, staggered terms have a discriminatory effect upon Norfolk's City Council elections, it would be expected that in those years in which the fewest seats were up for election blacks would be unsuccessful in seeking office. To the contrary, in four of the five elections held since 1968 in which three seats were available a black has been elected, that is, Joseph Jordan in 1968, 1972, and 1976, and Rev. John Foster in 1984.

Furthermore, the plaintiffs' allegation with regard to head-to-head contests is not supported by the evidence. The field of candidates in City Council elections since 1968 has ranged from eight in 1968, when three seats were available, to twenty-one in 1974, when four seats were available. For the elections which were held from 1968 through 1984, the average number of candidates per election was thirteen. The large field of candidates in Norfolk City Council elections minimizes the likelihood of head-to-head contests.

5. *Numbered Post or Residency Requirements*

There are no numbered post or residency requirements governing Norfolk City Council elections. A numbered post requirement, which would require candidates to seek particular seats on council, would create head-to-head contests, which the plaintiffs find objectionable. A residency requirement, which would in effect be equivalent to a numbered post requirement, similarly would encourage head-to-head contests.

6. *Summary*

In summary, the Court finds that the City has not used any of the enumerated voting practices or procedures to discriminate against black voters.

G. Candidates Slating

Defense witness D. Timothy J. O'Rourke, a University of Virginia political scientist, defined a slating group as "a permanent or semipermanent organization who [sic] recruits candidates to run for office. Having recruited them, [it] puts them up as a slate for as many seats as are open, and organizes a campaign and promotes those candidates in a campaign as a slate." (Tr. 1961-62). As an example of slating groups, Dr. O'Rourke cited political party organizations. (Tr. 1962). The Court adopts the definition of a slating group offered by the defendants.

The plaintiffs allege that an all-white group of businessmen, referred to as the "westside businessmen's coalition" during the trial, has twice run a slate of all-white candidates and that no blacks were ever asked by the members of the group to run on its slate. The plaintiffs refer to the 1976 election in which Vincent J. Thomas and G. Conoly Phillips ran for election together and the 1980 election in which Thomas and Phillips ran with Joseph A. Leafe.

The plaintiffs implied throughout the trial that this "westside businessmen's coalition" has sufficient influence to determine who will be elected to the City Council. The plaintiffs offered no evidence, other than the testimony of the plaintiffs themselves, that this "westside businessmen's coalition" is a slating organization and the Court finds that this group does not constitute a slating organization as defined by Dr. O'Rourke. When Thomas and Phillips ran together in 1976, although there were three seats up for election, the two candidates did not ask a third candidate to run with them. A slate, as defined by Dr.

O'Rourke, consists of as many candidates as there are seats available. Accordingly, the Thomas-Phillips ticket could not constitute a slate. While Phillips and Thomas may have been asked to run by individual members of the business community, there is no evidence that they were recruited to run by a slating organization.

With regard to the 1980 election, Joseph Leafe testified that he was asked to run by then Mayor Thomas. Leafe had decided not to run again for the Virginia House of Delegates, in which he had served as a member from 1972 to 1980. Leafe stated that he did not have discussions with either Joshua Darden or Harvey Lindsey, identified during the trial by the plaintiffs as leaders of the "westside businessmen's coalition," before he decided to run. Leafe was not recruited to run by any single group; rather he was encouraged to run by voters from throughout the City. Leafe ran with Thomas and Phillips in 1980 and the three shared election expenses. They did not consider themselves to be a businessmen's slate. Leafe and Thomas were elected; Phillips was not. There is no evidence that the three candidates were recruited by a slating organization. It is more likely that the two incumbents, who had run together successfully in the 1976 election, sought a third candidate who shared their stance on the issues and who would be willing to share campaign expenses. The plaintiffs' theory, that this so-called "westside businessmen's coalition" is controlling the Norfolk City Council elections, is not supported by credible evidence.

The only possible example of slating by an organization in Norfolk City Council elections, as established by the evidence, occurred in 1982, when the City Democratic Committee endorsed a biracial slate of two black and two white candiates. The two black candidates who were members of that slate were Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs in this action. All four of the candidates who ran on the Democratic Committee slate failed to win election.

Both the plaintiffs and defendants agree that the Concerned Citizens of Norfolk, a black political organization, has endorsed both black and white candidates for Council, but that the group is not a slating organization because it neither recruits candidates for office nor runs the endorsed candidates on a slate.

In summary, the Court finds that the only possible candidate slating by an organization which has occurred in Norfolk City Council elections occurred in 1982, when the City Democratic Committee endorsed a biracial slate of candidates. The Court further finds that the plaitniffs failed to prove the existence of a candidate slating organization which denies black candidates access to the process.

H. Socio-economic Disparities

1. *Education*

According to the 1980 Census, the percentage of adult blacks (25 years or older) in Norfolk with no more than an elementary school education is 31.15%, a drop of 16.18% from the figure reported in the 1970 Census. The percentage of adult blacks in Norfolk with less than four years of high school education is 55.3%, according to the 1980 Census, a drop of 18% from the 1970 figure. By way of comparison, 1980 Census figures show that 12.0% of Norfolk's adult whites have only an elementary school education, and that 29.8% of the adult white population has less than four years of high school education. Of the total adult population with four or more years of college, blacks comprised 16.48% and whites 72.2%. The 1970 figure for blacks was 12.95%, showing an increase in the number of college educated blacks.

2. *Income*

According to the 1980 Census statistics, 35.46% of all black persons residing in Norfolk have incomes below the poverty level, compared to 11.5% of all white persons.

This figure reflects a drop of almost 4% from 1970 for black persons. The 1980 Census figures also show that the median income for Norfolk's whites is $17,548, while the median income for Norfolk's blacks is $10,258.

3. *Housing*

According to the 1980 Census, over 10% of all housing units occupied by blacks have more than one person per room, as compared with less than 2% of white-occupied households. The 1970 Census figures reflect a decrease in black households having more than one person per room of over 8% over the last decade. The 1980 Census figures also reflect that the median value of white owner-occupied households exceeds that of black owner-occupied households by $11,100.

4. *Employment*

The 1980 unemployment rate for blacks (11.9%) is more than twice that of whites (5.3%).

5. *Health*

The plaintiffs assert that the 1982 infant mortality rate and 1982 rate of new cases of tuberculosis in Norfolk were higher for blacks than for whites. The Court is unable to verify these figures because the plaintiffs did not indicate the source of their figures.

6. *Effect of Socio-economic Disparities*

Despite the disparities between the black and white citizens of Norfolk in the areas of education, employment, housing and income, the voter participation figures show that they have not hindered the participation of Norfolk's blacks in the electoral process. Blacks are registering to vote and turning out to vote at rates equal to or greater than the rate for whites, based on a percentage of the voting age population.

One longtime observer and participant in Norfolk politics, Judge Joseph A. Jordan, Jr., a black former City Council member testified that the failure of blacks to vote in Norfolk elections cannot be blamed on the economic status of blacks. He places the blame, at least in part, on the black leadership's failure to continue efforts begun in the 1950's aimed at achieving total black suffrage in Norfolk, and which were subsequently discontinued by the blacks. (Tr. 1521-23).

The Court is pleased to note that the position of Norfolk's black residents has improved in the areas of education, housing and employment in recent years. This may well be in some part due to their continued and increasing participation in the political process.

I. Racial Appeals

The plaintiffs point out only one City Council campaign that they contend was characterized by appeals to the racial prejudices of white voters. The plaintiffs allege, and their expert Dr. Jerry Himelstein, a sociologist, testified, that the 1982 campaign was characterized by subtle and overt racial appeals. Dr. Himelstein's conclusion was based solely on a study of newspaper accounts of the 1982 campaign during the four months preceding the election. He testified that the two dominant themes which emerged were public school busing as a racial issue and the issue of black representation on the City Council.

Dr. Himelstein testified that his opinion that the school busing issue constituted a racial appeal was confirmed by an examination of the Brace report's 1982 election statistics and by a letter from former Lieutenant Governor Henry E. Howell, Jr. to then Mayor Vincent Thomas, which appeared in *The Virginian-Pilot*. Dr. Himelstein suggested that the issue of busing effected the outcome of the election because the three white candidates who were elected, Dr. Mason C. Andrews, Claude J. Staylor,

Jr. and Robert E. Summers, all opposed busing. The Court believes, however, that the election of these three candidates can as easily be attributed to their incumbency, and that Dr. Himelstein's suggestion that they were elected because of their opposition to busing is unsubstantiated.

Dr. Himelstein's other so-called confirmation of his analysis, the Howell letter to Thomas, is equally lacking in validity. Howell testified that his letter, in which he urged Thomas to reconsider his opposition to busing, "didn't have anything to do with the campaign." (Tr. 1584). Howell further testified that he never heard any discussions of busing by candidates during the 1982 election that he would characterize as racial appeals.

The Court concludes from the evidence that the issue of public school busing was a legitimate public concern and not an appeal to racial prejudices. Both black and white candidates addressed the issue of busing during the 1982 campaign, although many of the candidates spoke to the issue reluctantly and often only when questioned by the public about their stance on the issue. The evidence fails to show that any of the candidates intended to, or did in fact, use the issue to appeal to the racial prejudice of voters.

. Dr. Himelstein also testified that news accounts of the 1982 campaign frequently discussed the race of the candidates and raised the issue of black representation on the Council. It appears to the Court, from reading the newspaper accounts, that this issue was one raised by the black candidates. There was no evidence that this issue constituted an appeal to the racial prejudice of voters.

The Court concludes that the evidence fails to show that the 1982 campaign was characterized by subtle or overt racial appeals. In fact, Rev. Joseph N. Green, Jr., a black member of the Council, was reelected in the 1982 election with the support of over 30% of the white voters.

The statistics indicate that Rev. Green received approximately the same support from white voters in 1982 as he received in the 1978 election, indicating no withdrawal of white support from Rev. Green, who favored school busing. The plaintiffs do not suggest that racial appeals were made in any other City Council election.

J. Election of Blacks to Public Office

Blacks currently hold elective positions on the Norfolk City Council, in Norfolk's delegation to the Virginia House of Delegates, and as the sheriff of the City of Norfolk. Two blacks, Revs. Joseph N. Green, Jr. and John Foster, currently serve on the seven-member City Council. Two blacks, William P. Robinson, Jr. and Dr. Yvonne Miller, are members of Norfolk's five-member delegation to the Virginia House of Delegates. The sheriff of the City of Norfolk is David Mapp, a black.

Since at-large elections were instituted in 1918, three blacks have been elected to membership on the Norfolk City Council. At least one black has served on the Council continuously since 1968. Joseph A. Jordan, Jr., a black, was first elected to the City Council in 1968 and was reelected in 1972 and 1976. He served as vice mayor during his last two terms, a position to which he was elected by the members of the Council. Following Jordan's appointment to a judicial position in 1977, Rev. Joseph N. Green, Jr., a black, was appointed to fill Judge Jordan's unexpired term. Rev. Green was elected to the Council in 1978 and again in 1982. He has served as vice mayor since 1982 and was recently reelected to that office, Rev. John Foster, a black, was elected to the City Council on May 1, 1984.

As a result of Rev. Foster's election, two blacks, Revs. Green and Foster, will serve on the seven-member Council through June 30, 1986. The plaintiffs insinuated throughout the trial that the election of Rev. Foster to the Council, which occurred after the filing of this lawsuit,

was an attempt by unnamed white city officials and other community leaders to moot this action. The plaintiffs point to former Mayor Vincent Thomas' decision to forgo seeking reelection in 1984, and suggest that his decision was part of this alleged conspiracy. Mayor Thomas stated that he decided not to seek reelection in 1984 for personal reasons. He further stated that his support for the election of a second black to Council predated the filing of this action and the Court is not persuaded to the contrary by the plaintiffs' innuendo. There is no evidence that the election of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action.

Norfolk's delegation to the Virginia House of Delegates has included at least one black member since 1969, when William P. Robinson, Sr. was first elected. Robinson, Sr. served in the House of Delegates until his death in 1981. Following his death, his son, William P. Robinson, Jr., was elected a member of Norfolk's delegation to the House of Delegates and he remains a member, having been reelected in 1983. In 1982, Norfolk was divided into single-member districts for the election of members of the House of Delegates, those elections having previously been conducted at-large. In the 1982 special election, the first conducted under the single-member districts plan, Robert Washington, a white, defeated William Swindell, a black and a plaintiff in this lawsuit, in a head-to-head race to represent the newly created 89th District, a predominately black district. In 1983, Delegate Washington declined to seek reelection, and Dr. Yvonne Miller, a black, ran unopposed for election to the House of Delegates from the 89th District. Consequently, two of the five current members of Norfolk's delegation to the Virginia House of Delegates are black, Delegates Miller and Robinson.

David Mapp became the first black elected to a constitutional office in Norfolk when he was elected sheriff in 1981. In the primary election, Sheriff Mapp defeated a

white challenger in a head-to-head contest. In the general election he overwhelmingly defeated three white candidates. Sheriff Mapp received the endorsements of the outgoing sheriff, a white, and the Democratic party.

K. Responsiveness

1. *Appointments to Boards and Commissions*

The plaintiffs contend, and their expert Dr. Loren Solnick, a labor economist, testified, that black residents are underrepresented on Norfolk's appointive boards and commissions. The parties have stipulated to the racial composition of the 58 boards, commissions and authorities appointed in whole or in part by the Norfolk City Council. Of the 438 appointive positions, 344, or 78.54%, are filled by white residents and 94, or 21.46%, are filled by black residents. Seventeen of the boards and commissions are all-white, including the Granby Mall Advisory Commission, the Municipal Bond Commission, the Police-Fire Trial Board, and the Tidewater Community College Board. One of the boards, the Southeastern Tidewater Opportunity Project Board of Directors, is all-black. Two of the boards and commissions have a majority black membership and an additional two have an equal number of black and white members.

These figures, taken alone, would suggest, as Dr. Solnick testified his study shows, that blacks are indeed underrepresented on the City's appointive boards and commissions, considering that blacks constitute 31.48% of Norfolk's voting age population and only 21.46% of the appointive positions are held by blacks. The defendants presented evidence, however, in the form of City ordinances, which shows that in order for a citizen to serve on certain boards and commissions he or she may be required to meet certain criteria. Such criteria include special knowledge, experience, training or education in the relevant field.

In addition, some of the members of certain commissions and boards are required to be representatives of particular groups or sectors of the community. For example, City Code Section 31.47 provides that the five members of the Granby Mall Advisory Commission shall consist of: one representative of the Norfolk Redevelopment and Housing Authority, one representative of the Downtown Norfolk Association, one representative of the Norfolk Chamber of Commerce, one representative of the Retail Merchants Association, and one representative of downtown business interests. Over seventy-five of the seats on boards and commissions carry with them special qualifications as contained in the City ordinances.

The plaintiff's expert, Dr. Solnick, assumed in his study that every person in the voting age population is eligible to serve on the boards or commissions. This is obviously a flawed assumption, as demonstrated by the evidence offered by the defendants. When confronted with the defendants' evidence, Dr. Solnick admitted that he failed to consider these special requirements in his study. The plaintiffs failed to respond with any more accurate figures, which would take into account the special qualifications needed to serve on many of the boards and commissions, despite having the opportunity to do so on rebuttal. The plaintiffs having failed to present an accurate study upon which the Court could base an evaluation, the Court is unable to find that the City has failed to appoint blacks to boards and commissions in proportion to their representation in the voting age population of the City. The Court notes, however, that blacks are well-represented on the more important boards and commissions, such as the School Board, the Norfolk Redevelopment and Housing Authority Board of Commissioners, the City Planning Commission, and the Civil Service Commission.

2. *City Employment*

The plaintiffs contend, and their expert Dr. Loren Solnick testified, that his study shows that blacks are

underrepresented in City government supervisory positions, as well as in the Norfolk Police and Fire Departments. The parties have stipulated that as a percentage of total municipal employment, blacks comprised 36.16% of the municipal work force in 1973 and 41.31% of the work force in 1983. According to the City's 1983 EEO-4 report, as amended, the percentage of black city employees in each of the following job categories was:

Officials Administrators	5.5%
Protective Services	10.02%
Professionals	31.77%
Paraprofessionals	60.28%
Technicians	23.11%
Office Clerical	39.48%
Skilled Craft Workers	42.11%
Service Maintenance	81.74%

In Dr. Solnick's study he compared the City's employment of blacks in these eight occupational categories with the 1980 Census data for the Norfolk SMSA, specifically the employment of blacks and whites in comparable occupational groups. The plaintiffs allege, based on Dr. Solnick's study, that blacks are particularly underrepresented in the officials administrators and protective services categories. The plaintiffs' study found no underrepresentation of city employees in the remaining six categories: professionals, paraprofessionals, technicians, office/clerical, skilled craft workers and service maintenance.

With regard to officials and administrators, Dr. Solnick's comparison included figures from the 1980 SMSA Census tables for public officials and administrators at the federal, state and local levels. The Court agrees with the defendants that the more appropriate comparative group would be limited to officials and administrators employed at the local level. Using that group as the comparison, the difference between the City's black officials

and administrators (5.5%) and the figure drawn from the Census tables (6.5%) is insignificant.

With regard to protective services employees, a category which in the City of Norfolk is limited to police and firefighters, the Court points out that the City's hiring in the Police and Fire Departments has been controlled by a consent decree entered by another Judge of this Court in the case of *United States v. City of Norfolk*, Civil Action No. 78-418-N (E.D.Va. Aug. 28, 1978). The evidence shows efforts by the City to recruit black applicants for positions in the Police and Fire Departments. In addition, the percentage of blacks in the City's Police and Fire Departments does not differ significantly from the 1980 SMSA Census figures for blacks employed in police and firefighting occupations.

The Court notes that the plaintiffs did not present any evidence of qualified black applicants being turned down for City employment.

3. *Libraries*

The parties have stipulated that both in terms of location of libraries and programs offered, the Norfolk City Libraries Department does not discriminate against black citizens and is responsive to the needs of black citizens.

4. *Fire Department Services*

The parties have stipulated that both in terms of locations of fire stations and responses to fire alarms, the Norfolk Fire Department does not discriminate against Norfolk's black citizens and is responsive to the needs of black citizens.

5. *Police Department Services*

The plaintiffs offered little evidence of discrimination by the Norfolk Police Department against black citizens.

The Court finds on the basis of the evidence offered by the defendants that the Police Department has undertaken a series of community relations efforts designed to improve its relations with the black community. These efforts include the establishment of a Police Community Relations Unit, the maintenance of storefront operations in black neighborhoods, and the creation of the Block Security and Comprehensive Crime Prevention programs. The Court further finds that the Police Department is responsive to the needs of black citizens.

6. *Social Services*

The parties have stipulated that in terms of location of facilities and services provided, the Norfolk Department of Human Resources does not discriminate against black citizens and is responsive to the needs of Norfolk's black citizens. The defendants' evidence shows that the City offers a variety of social service and public assistance programs which have primarily benefitted black residents.

7. *Health Services*

The plaintiffs offered no evidence that the Norfolk Department of Health discriminates against black citizens or is unresponsive to their needs. The Court finds, on the basis of the evidence offered by the defendants, that the City offers numerous health programs which have primarily benefitted black residents.

8. *Parks and Recreation*

The plaintiffs offered no evidence that the Department of Parks and Recreation is unresponsive to the needs of black citizens. The evidence offered by the defendants shows that City's recreational facilities and services are utilized by black residents at a greater rate than that of white residents.

9. *Cemeteries*

The plaintiffs offered no evidence that the City's cemeteries are operated in a discriminatory manner, and the Court finds that the defendants have demonstrated that the City's eight cemeteries are operated on a nondiscriminatory basis.

10. *Education*

The plaintiffs attempted on several occasions to raise the issue of public school busing in this case. The Court declined to permit them to do so. The Court refers the parties to Judge MacKenzie's opinion in *Riddick v. School Board of City of Norfolk*, Civil No. 83-326-N (E.D.Va. July 9, 1984). The plaintiffs have failed to establish any discrimination against black students in the Norfolk public school system. In fact, the Superintendent of Schools is black.

11. *Public Works and Utilities*

The plaintiffs presented little evidence of a lack of responsiveness by the Department of Public Works to the needs of black residents. The Court finds on the basis of the evidence offered by the defendants that the Department of Public Works provides street lighting, paved roads, drainage, solid waste removal and street cleaning to all parts of the City on a nondiscriminatory basis and is responsive to the needs of black residents. The plaintiffs offered no evidence that the Department of Public Utilities discriminates in its provision of water and sewer services to the City's residents, and the Court finds no such discrimination.

The Court finds that since 1970, the City has expended millions of dollars on capital improvement projects in predominantly black neighborhoods. The parties agree that from 1970 through September, 1983, the City of Norfolk spent over $9.3 million in Berkley, a predomi-

nantly black-occupied area of Norfolk, and allocated an additional $3.5 million to be spent. The funds were spent on capital projects including street repairs, a senior citizen center, branch library replacement, fire station replacement and neighborhood facilities program. Of the funds already spent, approximately $6.5 million was federally funded and $2.5 million was locally funded. Of the funds yet to be spent, $.5 million will be federally funded and $3 million will be locally funded.

The parties also agree that from 1969 through October, 1983, the City has spent over $19 million in the Church Street/Huntersville area, another predominantly black-occupied area of Norfolk, with an additional $4.9 million allocated to be spent. The funds were spent on capital improvement projects including street repairs, cemetery repairs, day care center acquistion, and rehabilitation to Young Park, a subsidized housing project. Of the over $19 million already spent, $17.5 million was federally funded and $1.7 million was locally funded. Of the $4.9 million yet to be spent, $4.8 million will be federally funded and $1 million will be locally funded.

12. *Housing*

a. *Code Enforcement*

The plaintiffs presented no evidence of discriminatory enforcement of the City Housing Code by the Department of Community Improvement or the Division of Housing Services. The Court is persuaded by the evidence offered by the defendants that the Department of Community Improvement and the Division of Housing are responsive to the needs of black residents, and that many of the programs offered are designed to benefit the City's black citizens.

b. *Urban Redevelopment*

The plaintiffs contend that the Norfolk Redevelopment and Housing Authority (NRHA) has not been responsive

to the needs of black residents. The NRHA was established by the City in 1940, pursuant to State enabling legislation. The Norfolk City Council appoints the NRHA Board of Commissioners. The plaintiffs point out, and the defendants concede, that of the 21 commissioners who have served on the NRHA since 1940, only three have been black. Two of the five current commissioners, however, are black. The NRHA's main functions are the prevention and removal of slums and blight and the provision of low- and moderate-income housing in Norfolk.

The plaintiffs have alleged that the NRHA has not replaced low-income housing which was demolished through slum clearance programs with other low-income housing on a one-to-one basis. David H. Rice, executive director of the NRHA, testified that this allegation is factually incorrect, and that in fact, the number of low-income housing units which were made available exceeds the number of low-income units which were demolished. According to NRHA figures, during the period from 1950 to the date of trial, the NRHA was responsible for the demolition of 10,900 low-income housing units as part of its slum clearance and urban renewal efforts. During the same time period, NRHA figures indicate that the NRHA was responsible for the production of 9,615 new low-income housing units, made available an additional 552 units under a federally subsidized housing program known as "Section 8," and rehabilitated 74 units using Section 8 funds. In addition, the NRHA, under its own conservation program, rehabilitated another 3,000 units by improving their condition from "substandard" to "standard." Totaling these figures, it appears that the NRHA has made available for occupancy 13,241 low-income housing units during the period from 1950 to the date of trial, over 2,300 more than were demolished during the same period.

These figures, which the Court finds to be credible, rebut the plaintiffs' allegation that the NRHA has not

replaced low-income housing on a one-to-one basis. The Court further finds that all persons displaced by NRHA programs are required by NRHA procedures to be relocated into "decent, safe and sanitary housing," and that these procedures have been complied with. (Tr. 1739, 1741).

c. *East Ghent*

The plaintiffs rely upon the redevelopment of East Ghent to bolster their claim that the NRHA's policies and programs are racially discriminatory. Both parties agree that prior to redevelopment, East Ghent was a severely run-down predominantly black neighborhood. According to NRHA executive director Rice, approximately 1,800 families, almost all of whom were black, were relocated as a result of the East Ghent redevelopment project. The plaintiffs contend that those who were relocated were given indications that they would be able to return to East Ghent when redevelopment was completed. Mr. Rice concedes that in the early stages of the redevelopment project, indications were made that the NRHA would include some subsidized housing in its plans for East Ghent.

A 150-unit federally subsidized housing project for the elderly was the first housing built in East Ghent. In 1974, the NRHA Board of Commissioners made a decision not to locate any additional low-income housing projects in East Ghent. This decision was based upon a desire to attract middle-income families back into the City's downtown area to provide a much needed tax base. Other considerations included the fact that the federal programs that provided subsidies for privately owned housing had been halted in 1974. The City Council approved the NRHA's application to rezone the East Ghent area from R-4 (Multiple Residence District), R-5 (Multiple Residence District), C-1 (Neighborhood Commercial District), C-3 (General Commercial District) and M-1

(Limited Manufacturing District) to PD-H (Planned Development District—Housing) on November 5, 1974 by a 6-1 vote. According to Carroll A. Mason, who was then Area Director of the United States Department of Housing and Urban Development, HUD agreed with the City's assessment of the need to broaden its tax base.

The Court concludes that the NRHA's decision to promote middle-income housing in East Ghent was not racially motivated, but rather was motivated by a genuine desire to broaden the City's downtown tax base. In addition, the Court finds that the NRHA's decision was consistent with the City's efforts to revitalize its downtown area.

d. *Community Development Block Grant Programs*

Since the mid-1970's, the City has participated in Community Development Block Grant (CDBG) programs administered by the United States Department of Housing and Urban Development (HUD). The CDBG program provides federal funds for such purposes as programs benefitting low- and moderate-income persons. During the years of its participation in the CDBG programs, the City has received nearly $100 million in federal funds.

The plaintiffs have alleged that the NRHA has repeatedly violated federal statutes and regulations with regard to achieving racial balance in public housing projects. The defendants contend that the City's funds have never been reduced, delayed, suspended, or disapproved by the Federal government for any reason, including any violation of federal statutes or HUD regulations. The Court has thoroughly reviewed the testimony and the documentary evidence on both sides. The Court accepts as credible the testimony of past and present NRHA officials that they have had little success in their attempts to achieve racial balance in the City's public housing

projects because: (1) HUD regulations require that preference for placement in projects be given to those who have been displaced, and those Norfolk residents who have been displaced are overwhelmingly black; (2) HUD prohibits the use of quotas or preferential treatment on the basis of race to ensure racial balance; and (3) those who seek public housing in Norfolk are predominantly black. The NRHA officials' testimony is supported by the testimony of Carroll Mason, former Area Manager of HUD. The Court finds that it would be impossible for the City to achieve racial balance in its housing projects when it does not have enough white applicants to achieve that goal.

e. *Racial Integration of Neighborhoods*

The plaintiffs allege that the City of Norfolk is racially segregated, in large part due to the NRHA's placement of public housing projects in predominantly black neighborhoods. The defendants contend that this is not so, citing the testimony of urban demographer Dr. William A. Clark that Norfolk is "a reasonably well integrated city." (*Riddick*, Tr. 3069). The defendants further rely on Dr. Clark's studies to show that even a random allocation of the City's public housing projects would have had only a minor impact on the racial makeup of the City's neighborhoods. The Court finds no evidence to the contrary and therefore concludes that the plaintiffs have failed to substantiate this claim.

13. *Summary*

The Court finds evidence of substantial black-employment in City jobs, significant black representation on appointive boards and commissions, considerable expenditures of federal and local funds in black occupied areas, and a nondiscriminatory provision of essential city services and capital improvements to black residential neighborhoods.

L. Tenuousness of Policies Supporting At-Large Elections

The plaintiffs suggest that the use of an at-large election system in Norfolk is pursuant to a tenuous policy. The Court finds, to the contrary, that the policy is by no means tenuous.

As defendants' expert, Dr. Timothy J. O'Rourke, testified, the city manager-council form of government is associated with the at-large election system throughout the nation. According to a 1981 survey, of the cities nationwide with populations of between 250,000 and 500,000 which have council-manager forms of government, over 75% have at-large elections for council.

All of Virginia's forty-one cities have the council-manager form of government. Only six of those cities do not have at-large elections for council. The cities of Petersburg, Richmond and Lynchburg abandoned at-large elections after Justice Department objections to proposed annexations under Section 5 of the Voting Rights Act. Suffolk's abandonment of the at-large system dates to a city-county consolidation. Hopewell abandoned at-large elections in settlement of a Section 2 action. Winchester, Lynchburg and Hopewell have adopted systems in which some council members are elected from wards and some at-large. The remaining thirty-five Virginia cities have at-large elections.

The Court concludes that Norfolk's policy of at-large City Council elections is consistent with both national and State practices for cities with the council-manager form of government. The Court finds no evidence that Norfolk's at-large election system is the product of a tenuous policy.

M. Black Participation in the Electoral Process in Norfolk

The extent of black participation in Norfolk's elections is best illustrated by an examination of the role which the Concerned Citizens of Norfolk, a black political or-

ganization, has played, as well as an examination of the participation of blacks in the City Democratic Party.

1. *The Concerned Citizens of Norfolk*

Founded in the 1960's the Concerned Citizens has become the most influential black political organization in Norfolk. The original co-directors of the group were Joseph A. Jordan, Jr. and Dr. William P. Robinson, Sr., both black residents of Norfolk. Dr. Robinson served as a member of the City's delegation to the Virginia House of Delegates from 1969 until his death in 1981. Joseph A. Jordan, Jr. served on the City Council from 1968 until 1977 and served as vice mayor from 1972 to 1976. He was appointed to a judgeship on the General District Court in 1977. Both were elected repeatedly in at-large elections. Today, the co-directors of the Concerned Citizens are William P. Robinson, Jr., a member of Norfolk's delegation to the Virginia House of Delegates since 1981, and Mrs. Evelyn T. Butts, who has unsuccessfully sought a seat on the City Council three times.

Prior to each election in Norfolk, a committee of the Concerned Citizens interviews the candidates who are seeking the organization's endorsement. The group's endorsements are presented primarily through the issuance of the Goldenrod guide ballot, which lists the names of the endorsed candidates. The guide ballot is widely distributed on election day.

The effectiveness of the Concerned Citizens' endorsements in garnering the votes of black citizens for the endorsed candidates can be seen from a review of several City Council elections. In 1974, for example, the Concerned Citizens endorsed two white candidates, Elizabeth Howell, wife of former Lieutenant Governor Henry E. Howell, Jr., and Claude J. Staylor, Jr., former Norfolk Chief of Police. The organization also endorsed a black candidate, Lenious G. Bond. Three other black candidates

were amongst the field of twenty-one candidates, including Dr. Milton A. Reid, a plaintiff in this action. Dr. Reid sought, but did not receive, the Concerned Citizens' endorsement. Mrs. Howell received over 58% of the black vote[6] and Mr. Staylor received over 56% of the black vote and both were elected. Mr. Bond received 73% of the black vote, while Dr. Reid received only 36% of the black vote.

In 1980, the Concerned Citizens again endorsed Mrs. Howell. The organization also endorsed one black candidate, Mrs. Evelyn T. Butts, the co-director of the group. The only other black candidate in the field of twelve was George H. Banks, a plaintiff in this lawsuit. Mr. Banks was not endorsed by the Concerned Citizens, and received only 34.5% of the black vote. The endorsed candidates, Mrs. Howell and Mrs. Butts, received 72.9% and 92.9% of the black vote, respectively.

In the 1982 election, there were four black candidates in the field of fourteen. The Concerned Citizens endorsed two of the black candidates, Rev. Joseph N. Green, Jr. and Mrs. Butts. The two other black candidates, Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs, were not endorsed. Mr. Collins and Mr. Gay each received less than one-third of the black vote, whereas Rev. Green and Mrs. Butts each received over 87% of the black vote.

The Concerned Citizens endorsed two black candidates, Rev. John Foster and Mrs. Butts, and one white candidate, Joseph Leafe, in the 1984 election. Two black candidates who ran without the Concerned Citizens' endorsement, Theodore Hall and Joseph Rose, received 8.9% and 18.7% of the black vote, respectively. Mr. Leafe, who received only 1.7% of the black vote in 1980 when he ran without the Concerned Citizens endorsement, received

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[6] The figures in this section are all based on homogeneous precinct analysis.

19.6% of the black vote in 1984, more than either Hall or Rose. Mrs. Butts received 72.1% of the black vote and Rev. Foster received 79.9%.

The plaintiffs have acknowledged the effectiveness of the Concerned Citizens' endorsements. In addition, the group's effectiveness is demonstrated by their success rate. From 1978 through 1984, the Concerned Citizens has endorsed twenty-one candidates, both black and white, for the Norfolk City Council. Thirteen of those candidates, five black and eight white, have been elected. From 1970 to the present, the City Council has included at least two, and sometimes three, members who were endorsed by the Concerned Citizens, and who received a majority of the black vote. Six of the seven current Council members were endorsed by the Concerned Citizens in at least one of their campaigns.[7]

2. *The City Democratic Party*

The parties agree that Norfolk's black citizens generally support Democratic candidates in partisan elections. Approximately 31% of the Norfolk City Democratic Committee members are black. Two of the Committee's six officers, the first vice chairman and the treasurer, are black.

There have been close ties, historically, between the black members of the City Democratic Committee and the leaders of the Concerned Citizens of Norfolk. In 1981 and 1982, however, a rift occurred in the City Democratic Committee which was related to the 1982 City Council campaign and involved several of the plaintiffs in this action.

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[7] The Council members and their year/s of endorsement are as follows: Dr. Mason C. Andrews (1978), Rev. John Foster (1984), Rev. Joseph N. Green, Jr. (1978, 1982), Elizabeth Howell (1974, 1978, 1980), Joseph Leafe (1984) and Claude J. Staylor, Jr. (1974).

In the fall of 1981, an election of precinct committee members was scheduled, but Party Chairman William P. Williams failed to notify Mrs. Butts, co-director of the Concerned Citizens, of the filing deadlines, as had been done customarily by past party chairmen. As a result, many persons who had previously served as precinct committee members missed the filing deadline and consequently were replaced. Approximately one-half of the precinct committee members were replaced by new precinct committee members. Herbert M. Collins, a plaintiff in this action, was among the new precinct committeemen. Mrs. Butts challenged the election in a December, 1981 meeting of the Committee, charging that it should be voided for failure to provide proper notice.

In the spring of 1982, the newly constituted City Democratic Committee endorsed four of its members for City Council seats, this being the first time the Democratic Committee had ever endorsed City Council candidates. The Democratic ticket consisted of William P. Williams, party chairman, James F. Gay, counsel for the plaintiffs in this action, Herbert M. Collins, a plaintiff in this lawsuit, and Carolyn Papafil. Gay and Collins are black, while Papafil and Williams are white.

The Concerned Citizens endorsed Rev. Green and Mrs. Butts in the 1982 race, while plaintiff Dr. Milton Reid, publisher of the *Journal and Guide* newspaper, endorsed Collins and Gay. There was animosity between the Concerned Citizens and supporters of the Democratic ticket during the campaign. Rev. Green and Mrs. Butts each received over 87% of the black vote, while Gay and Collins each received less than one-third of the black vote.

In September, 1982, a petition was filed with the Second District Democratic Committee seeking new elections to the City Democratic Committee. An adversary hearing was eventually held before a representative of the State Democratic Party, in which James F. Gay, counsel for

the plaintiffs in this action, represented the then current members of the City Committee and Delegate William P. Robinson, Jr., represented the then former Committee members. The hearing officer recommended that new elections be held.

The City Democratic Committee did not hold new elections, despite the hearing officer's recommendation. In 1983, the members of the Committee who had been displaced in 1981 organized a mass meeting of Norfolk's Democrats and elected new Committee members in an at-large election. According to Delegate Robinson, the decision to hold the mass meeting was "purely politics," without any racial connotations. (Tr. 1687).

Included amongst those precinct committee members who lost their positions at the 1983 mass meeting were plaintiffs Herbert M. Collins, Dr. H. Marks S. Richard, Barbara C. Parham and counsel for the plaintiffs, James F. Gay. Subsequently, Mr. Gay filed a complaint with the Department of Justice, complaining about the reorganization of the City Democratic Committee. The Justice Department ultimately concluded that it did not have jurisdiction of the matter under Section 5 of the Voting Rights Act.

3. *Summary*

The Court concludes that blacks have played an active role in the City's political processes, particularly through the Concerned Citizens and the City Democratic Committee. Moreover, at least one black candidate has run in every City Council election since 1964. The Court concurs with the opinions expressed by Mrs. Evelyn T. Butts, Lt. Gov. Henry E. Howell, Jr., Judge Joseph A. Jordan, Jr., Delegate William P. Robinson, Jr., and former Delegate Robert Washington, all leading politicians, that blacks have the opportunity to participate in the City's electoral processes equally with whites, and have in fact done so. All of these long-time observers of, and partici-

pants in, City politics favor retention of the at-large electoral system. The Court gives their opinions great weight.

While the defendants contend that this lawsuit is in reality a case of the "ins" versus the "outs," as a result of past confrontations between the plaintiffs and the Concerned Citizens of Norfolk over endorsements and control of the City Democratic Committee, the Court finds it unnecessary in deciding the issues in this action to enter such a thicket or to make such a finding.

III. CONCLUSIONS OF LAW

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1973j(f).

Having already set forth the applicable law earlier in this opinion, the Court will now consider the plaintiffs' statutory and constitutional claims.

A. *Statutory Claim Under Section 2 of the Voting Rights Act*

1. *The Objective Factors*

   a. *The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.*

The law is clear that the existence of past discrimination in the areas of registration, voting and political participation is significant only if it can be shown to have lingering effects on the ability of blacks to participate in the democratic process today. *See Zimmer v. McKeithen*, 485 F.2d at 1305-06; *see also United States v. Marengo County Commission*, 731 F.2d 1546, 1567 (11th Cir. 1984). The Court has found that although there is a past history of official discrimination in Virginia affecting the

right of blacks to participate in the electoral process, there are no lingering effects of that discrimination which prevent Norfolk's black citizens from participating in the electoral process today. Norfolk's black citizens register to vote and turn out to vote at rates equal to or greater than that of Norfolk's white citizens when measured as a percentage of voting age population.[8] At least one black candidate has run in every Norfolk City Council election since 1964. Blacks also participate in the political process through the Concerned Citizens of Norfolk and the City Democratic Party. The plaintiffs have failed to prove that the past history of official discrimination in Virginia with regard to black participation in the electoral process has left any lingering effects on the ability of Norfolk's black citizens to participate in the electoral process today.

b. *The extent to which voting in the elections of the state or political subdivision is racially polarized.*

The Court has adopted the definition of racial polarization offered by the defendants' expert Dr. O'Rourke as one which is supported by common sense, as well as the law. *See, e.g., United States v. Dallas County Commission*, 548 F.Supp. 875, 887 (S.D. Ala. 1982) (considering white backlash in addition to voting patterns). The Court has found few courts which have actually considered what is an appropriate definition of "racially polarized voting." Courts have, however, looked beyond the statistics offered by the parties, as this Court has done, in determining whether an electorate is racially polarized. *See, e.g., Terrazas v. Clements*, 581 F.Supp. 1329, 1353 (N.D. Tex. 1984) (considering financing, endorsements, and incumbency). The Court concludes that under the definition of

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[8] Contrast this to the findings of the three judge court in *Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984). In that case, the court found a substantial disparity of 14% between black and white voter registration rates, with whites registering at the greater rate. At 360.

racially polarized voting which it has adopted, the Norfolk electorate is not racially polarized.

c. *The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.*

(i.) *Unusually Large Election Districts*

Unusually large election districts are considered to have discriminatory effects because they may make it "more difficult for blacks to get to polling places or to campaign for office." *Rogers v. Lodge*, 458 U.S. 613, 627, 102 S.Ct. 3272, 3281, 73 L.Ed.2d 1012 (1982). In that case, the Supreme Court was considering an election district consisting of Burke County, Georgia, which was 831 square miles, the equivalent of two-thirds of the State of Rhode Island. *Id.* In comparison, Norfolk is only fifty-three square miles. The Court has found that Norfolk is not an unusually large election district and therefore this so-called enhancing factor does not apply.

(ii.) *Majority Vote Requirements, Anti-Single-Shot Provisions or Numbered Post Provisions*

A majority vote requirement may impede the ability of black candidates to win in a city in which they constitute a minority of the population. *See Gingles v. Edmisten*, at 363. There is no majority vote requirement in Norfolk's electoral system.

An anti-single-shot provision may disadvantage minority voters because it "may force them to vote for non-minority candidates." *Nevett v. Sides*, 571 F.2d 209, 217 n.10 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980). There is no anti-single-shot rule governing Norfolk City Council elections.

A numbered post provision may disadvantage minority voters "by causing minority candidates to run in head-to-head contests against majority candidates." *Id.* There is no numbered post provision in Norfolk's electoral system.

(iii.) *Staggered Terms*

Staggered terms are considered to be a discriminatory device because they are thought to create more head-to-head racial contests. *See City of Rome v. United States*, 446 U.S. 156, 185 n.21, 100 S.Ct. 1548, 1565 n.21, 64 L.Ed.2d 119 (1980); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984). The Court has found, however, that this does not occur in Norfolk City Council elections because of the large field of candidates in every election.

(iv.) *Lack of a District Residency Requirement*

The courts are divided on the issue of whether district residency requirements enhance or weaken black voting strength. *Compare Rogers v. Lodge*, 458 U.S. at 627, 102 S.Ct. at 3281 (lack of district residency requirement enhances discrimination) *with Perkins v. City of West Helena*, 675 F.2d 201, 212 (8th Cir. 1982) (ward residency requirement enhances discrimination), *aff'd*, 459 U.S. 801, 103 S.Ct. 33, 74 L.Ed.2d 47 (1982). The lack of a ward residency requirement has not been shown by the evidence to enhance the opportunity for discrimination in Norfolk City Council elections.

(v.) *Summary*

The Court concludes that Norfolk's electoral system is free of any devices which enhance the opportunity for discrimination against the City's black citizens.

d. *If there is a candidate slating process, whether the members of the minority group have been denied access to that process.*

White v. Regester, 412 U.S. 755, 766-67, 93 S.Ct. 2332, 2339-40, 37 L.Ed.2d 314 (1973), and its progeny clarify

what is meant by this factor. *See, e.g., McIntosh County Branch of the NAACP v. City of Darien*, 605 F.2d 753, 758 (5th Cir. 1979). What the courts are concerned about is whether a small group of whites, acting as a formal or informal slating organization, effectively limits the ability of blacks to seek electoral office by excluding black candidates from its slating process. *See id.* The courts have considered to be relevant evidence that potential black candidates have been deterred from seeking electoral office because of fears of economic or other forms of reprisals from the members of the white slating group. *See id.*

The Court has found that there is no group of white Norfolk citizens who, acting as a formal or informal slating organization, controls access to the ballot. Moreover, the plaintiffs presented no evidence that any potential black candidate had ever been dissuaded from seeking election by fear of reprisals from any members of the white community. The Court has found that the plaintiffs' contention that a white westside businessmen's coalition acted as a slating organization in the 1976 and 1980 elections is not supported by the evidence. The Court has further found that the only possible instance of slating which has occurred in Norfolk City Council elections was the City Democratic Party's support of a biracial ticket of four candidates in the 1982 election. The Court concludes that there is no candidate slating process in Norfolk and therefore Norfolk's black citizens have not been denied access to such a process.

e. *The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.*

Congress explained its interpretation of this factor as follows:

> The Courts have recognized that disproportionate educational [,] employment, income level [,] and living conditions arising from past discrimination tend to depress minority political participation . . . . Where these conditions are shown, *and where the level of black participation is depressed*, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.114, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207 (emphasis added); *see Major v. Treen*, 574 F.Supp. 325, 351 n.31 (E.D.La. 1983). In other words, if the socio-economic statistics show a disparity between black and white residents *and* the level of black political participation is less than that of whites, the plaintiffs need not show a causal nexus between the two conditions. *See United States v. Marengo County Commission*, 731 F.2d at 1569.

In the present case, the Court has found a disparity between Norfolk's black and white citizens based upon the socio-economic statistics in such areas as education, income, and housing conditions. The Court has found, however, that the level of black political participation in Norfolk is equal to or greater than that of the City's white citizens, as measured by voter registration and voter turnout based upon a percentage of the voting age population, two measures which the courts have used to measure minority political participation. *See, e.g., id.* at 1568. The Court concludes that whatever socio-economic disparities exist between Norfolk's black and white residents, they do not hinder the ability of blacks to participate effectively in the City's political process today.

f. *Whether political campaigns have been characterized by overt or subtle racial appeals.*

In considering this factor, the courts have usually looked for a "general pattern of racial appeals in cam-

paigns." *Gingles v. Edmisten*, at 364. In this case, the plaintiffs have alleged that only one campaign, the 1982 City Council election, was marred by racial appeals. They point primarily to the discussion of public school busing by those candidates who favored or opposed a plan by the Norfolk School Board to reduce the busing of elementary school pupils.

The Court has found that the discussion of busing during the 1982 campaign was not an appeal to racial prejudices. The issue was a matter of legitimate public concern and was raised by both black and white candidates. There was no effort by the plaintiffs to show a history or general pattern of racial appeals in Norfolk City Council elections and the Court concludes that none exists.

g. *The extent to which members of the minority group have been elected to public office in the jurisdiction.*

It is clear, as the Court pointed out earlier in this opinion, that no group has a constitutional right to proportional representation. *See Whitcomb v. Chavis*, 403 U.S. 124, 156-57, 91 S.Ct. 1858, 1875-76, 29 L.Ed.2d 363 (1971); *Terrazas v. Clements*, 581 F.Supp. 1329, 1341 (1984). Congress explained the consideration which should be given to this factor as follows:

> The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote" in violation of this section. *Zimmer*, 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section, e.g., by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution . . . Instead,

> we shall continue to require an independent consideration of the record." *Id.*

S.Rep. No. 417, 97th Cong., 2nd Sess. 29 n. 115, *reprinted in* 1982 U.S.Code Cong. & Ad.News 177, 207.

The Court has conducted an independent review of the record, and contrary to the plaintiffs' claims, has found no evidence of an attempt by Norfolk's white citizens to circumvent the Constitution by manipulating the election of a "safe" minority candidate. The Court further found that a black has been elected to the City Council in every election since 1968, and that the Council currently has two black members. In addition to black membership on the Council, while candidates who have been the choice of a majority of the black electorate have been elected to the Council consistently over the years. Moreover, the Court has found that blacks have been elected to the City's delegation to the Virginia House of Delegates and to a City constitutional office in at-large elections. The Court concludes that blacks and candidates of choice of the black community have been elected to public office in Norfolk.

h. *Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.*

While the issue of responsiveness is not a necessary part of the plaintiffs' case, the plaintiffs have chosen to offer such evidence and the defendants have accordingly offered rebuttal evidence. *See* S.Rep. No. 417, 97th Cong., 2nd Sess. 29 n. 116, 1982 U.S.Code Cong. & Ad.News 177, 207. The Fourth Circuit has stated that the concept of "unresponsiveness" contemplates:

> a degree of unresponsiveness to the needs and interests of the black minority so palpable that it compels—or even fairly supports—an inference that the minority's "voting potential" has been so effec-

> tively "cancelled out" that its residual "political strength" is presently being disregarded with confident impunity by the city's governing body.

Washington v. Finlay, 664 F.2d 913, 923 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120, 102 S.Ct. 2933, 73 L.Ed.2d 1333 (1982). In that case, the Fourth Circuit upheld the district court's finding that the city had been responsive, stating:

> Support for this ultimate finding was found in employment figures showing substantial black employment in city jobs, in significant though concededly not proportional black representation in appointive offices and supervisory positions, in the heavy allocation of federal block grant development funds to the black community, and in the substantially equal provision of essential services and improvements to black residential neighborhoods.

Id. at 922.

The Court concludes that the plaintiffs raised a number of issues with regard to responsiveness, but that the evidence offered by the defendants rebuts the plaintiffs' allegations of unresponsiveness. The Court has found evidence of substantial black employment in City jobs, significant black representation on appointive boards and commissions, considerable expenditures of federal and local funds in black-occupied areas, and a nondiscriminatory provision of essential City services and capital improvements to black residential neighborhoods.

i. *Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.*

The Court is to consider whether the City's use of the challenged election procedure "markedly departs from

past practices or from practices elsewhere in the jurisdiction. . . ." S.Rep. No. 417, 97th Cong., 2nd Sess. 29 n. 117, *reprinted in* 1982 U.S.Code Cong. & Ad.News 207. The Court has found that Norfolk's at-large system for the election of City Council members has been in effect continuously since 1918. The Court has further found that Norfolk's at-large system of electing City Council members is consistent with the practices of an overwhelming majority of Virginia's cities, as well as with the practices nationwide of cities with council-manager forms of government. The Court concludes that the policy underlying the use of the at-large system is not tenuous.

2. *The Totality of the Circumstances*

The Court has already established the proper legal standard to be applied in this case with regard to the Section 2 claim, that is, whether, based on the totality of circumstances, the plaintiffs have shown that the political processes leading to the election of the members of the Norfolk City Council are not equally open to participation by the black citizens of Norfolk, in that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The Court has considered thoroughly the lengthy testimony and extensive documentary evidence in this case. The Court concludes, based on the totality of circumstances, that the plaintiffs have failed to prove that the political processes leading to the election of the members of the Norfolk City Council are not equally open to participation by the black citizens of Norfolk. The Court is convinced that Norfolk's black citizens have an opportunity equal to that of other members of the electorate to participate in the electoral process and to elect representatives of their choice.

B. Statutory Claim Under 42 U.S.C. § 1983

The Court concludes that the plaintiffs have failed to show that any citizen has been deprived of his or her right to vote on account of his or her race as a result of Norfolk's at-large electoral system. The plaintiffs presented no evidence, that, for example, a qualified black citizen was prevented from registering to vote or from actually voting.

C. Constitutional Claims

The Court has previously set out the appropriate legal standard to be applied in this case with regard to the constitutional claims, that is, whether the plaintiffs have shown that the at-large system was adopted and has been maintained with the intent of discriminating against the black citizens of Norfolk. Discriminatory intent need not be proven by direct evidence, but may be "inferred from the totality of the relevant facts." *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) (quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 48 L.Ed.2d 597 (1976)). Furthermore, racial discrimination "need only be one purpose, and not even a primary purpose, of an official act in order for a violation of the fourteenth and fifteenth amendments to occur." *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 (5th Cir.1984); *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

The plaintiffs presented no direct evidence that the at-large system was adopted for a discriminatory purpose. The plaintiffs urge the Court to infer from a series of newspaper articles and advertisements which appeared just days before the referendum on the charter change in 1917 that the proponents of the at-large system had racially discriminatory motives. The Court finds

exactly the opposite to be true. It was the opponents of the at-large system who injected the issue of race into the public debate over the charter change just days before the referendum. Supporters of the at-large system contended that race was not an issue and that the opponents of the charter change were trying to sway voters by injecting an irrelevant issue into the public debate. The Court concludes that the plaintiffs have failed to prove, either by direct or circumstantial evidence, that the at-large system was adopted for a racially discriminatory purpose. Likewise, the Court concludes that the at-large system has not been maintained for the purpose of discriminating against Norfolk's black citizens. In reaching these conclusions, the Court has considered all of the evidence submitted by the plaintiffs in support of their Section 2 claim.

IV. CONCLUSION

On the basis of the foregoing findings of fact and conclusions of law, the Court holds that Norfolk's at-large system for the election of City Council members does not violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1983, or the United States Constitution. Accordingly, the Clerk is DIRECTED to enter judgment in favor of the defendants, and against the plaintiffs, on all claims.

IT IS SO ORDERED.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-410

ROBERT M. COLLINS, *et al.*,
Applicants,

v.

CITY OF NORFOLK, VIRGINIA, ETC., *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extending to and including January 31, 1986.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 25th
day of November, 1985

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1819

HERBERT M. COLLINS, *et al.*,
Appellants,

versus

CITY OF NORFOLK, VIRGINIA, ETC., *et al.*,
Appellees.

[Filed Sept. 13, 1985]

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk
J. Calvitt Clark, Jr., District Judge

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Chapman. Judge Butzner dissents.

For the Court,
/s/ John M. Greacen
Clerk

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1819

HERBERT M. COLLINS; DR. H. MARKS S. RICHARD; BARBARA C. PARHAM; WILLIAM E. SWINDELL, JR.; DR. MILTON A. REID; NORFOLK BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; GEORGE BANKS; and JULIAN HAZEL,

Appellants,

v.

CITY OF NORFOLK, a municipal corporation; VINCENT J. THOMAS, Mayor; DR. MASON C. ANDREWS; JOSEPH A. LEAFE; REV. JOSEPH N. GREEN, JR.; CLAUDE J. STAYLOR, JR.; ROBERT E. SUMMERS; and MRS. ELIZABETH M. HOWELL, members of the Norfolk Electoral Board; PAUL D. FRAIM, MARTHA H. BOONE, and P M. LIPKIN, members of the City of Norfolk Electoral Board,

Appellees.

[Filed July 17, 1985]

Appeal from the United States District Court
for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, Affirmed.

JOHN M. GREACEN
/s/ John M. Greacen
Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action Docket No. 83-526-N

HERBERT M. COLLINS, *et al.*

vs.

CITY OF NORFOLK, VIRGINIA, *et al.*

JUDGMENT

This action came on for trial before the court, United States District Judge J. Calvitt Clarke, Jr., presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged that the plaintiff taking nothing, that the action be dismissed on the merits, and that the defendants recover of the plaintiffs his costs of action.

[Filed July 19, 1984]

W. FARLEY POWERS, JR.
Clerk of the Court
/s/ Bonnie L. Day
Deputy Clerk of the Court

APPENDIX G

VOTING RIGHTS ACT

§ 1973. * * * *

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this Section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

APPENDIX H

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court

(a) Effect. [Effective until August 1, 1985. See, also, subdivision (a) below.] In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(a) Effect. [Effective on August 1, 1985. See, also, subdivision (a) above.] In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact,

whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * * *

Supreme Court, U.S.
FILED
MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HERBERT M. COLLINS, *et al.*,

Petitioners,

v.

CITY OF NORFOLK, VIRGINIA, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "totality of circumstances" standard of Amended Section 2 of the Voting Rights Act is the District Court's determination that black citizens of Norfolk have equal opportunity to participate in the political process and to elect representatives of their choice clearly erroneous under Rule 52(a), Fed.R.Civ.P.?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	8
REASONS FOR DENYING THE WRIT	9
I. The Circuit Court Properly Applied The "Clearly Erroneous" Standard In Its Review of The District Court Opinion	9
II. The District Court's Analysis Of The Facts Was A Proper Application Of The Section 2 "Results Test"	13
A. The District Court's Analysis Of Racially Polarized Voting Is Fully Supported By The Authorities	13
B. The District Court's Detailed Findings On The Issue Of Responsiveness Were Fully Supported	19
C. The District Court Properly Analyzed The Factors	21
1. Slating Process	21
2. History of Official Discrimination	23
3. Discriminatory Electoral Mechanisms	25
4. Socioeconomic Disparities	27
III. The District Court Properly Concluded That The Election Of A Second Black To Council Was Not The Result of Manipulation By White Politicians	27

IV. The District Court Did Not Impermissably Weigh Remedial Concerns When Reaching Its Conclusion On The Liability Issue 29

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

CASES: Page

Anderson v. City of Bessemer, North Carolina, 470 U.S. ___, 84 L.Ed.2d 518 (1985) 7,11

Bolden v. City of Mobile, Alabama, 423 F.Supp. 384 (S.D. Ala. 1976), *aff'd.*, 571 F.2d 238 (5th Cir. 1978), *rev.*, 446 U.S. 55 (1980) 18

Brown v. Moore, 428 F.Supp. 1123 (S.D. Ala. 1976), *aff'd.*, 575 F.2d 298 (5th Cir. 1978), *vacated*, 446 U.S. 236 (1980) 25

Chapman v. Nicholson, 579 F.Supp. 1504 (N.D. Ala. 1984) 23

City of Petersburg v. United States, 354 F.Supp. 1021 (D.D.C. 1972), *aff'd.*, 410 U.S. 962 (1973) 17

City of Port Arthur v. United States, 517 F.Supp. 987 (D.D.C. 1981), *aff'd.*, 459 U.S. 159 (1982) 16

City of Rome v. United States, 472 F.Supp. 221 (D.D.C. 1979), *aff'd.*, 446 U.S. 156 (1980) 17,26

Davis v. Mann, 377 U.S. 678 (1964) 5

Gingles v. Edmisten, 590 F.Supp. 345, *pending sub nom. Thornburg v. Gingles*, No. 83-1968 (October Term 1985) 12,24,25

Jones v. City of Lubbock, 727 F.2d 364 (5th Cir . 1984) *reh. en banc denied*, 730 F.2d 233 (5th Cir. 1984) 15,16,26

Kirksey v. City of Jackson, Miss., 461 F.Supp. 1282 (S.D. Miss. 1978), *vacated*, 625 F.2d 21 (5th Cir. 1980) 23

Leadership Roundtable v. City of Little Rock, 499 F.Supp. 579 (E.D. Ark. 1980), *aff'd.*, 661 F.2d 701 (8th Cir. 1981) 16,21

Lee County Branch NAACP v. City of Opelika, 748 F.2d 1473 (11th Cir. 1984) 15,16

Major v. Treen, 574 F.Supp. 325 (E.D. La. 1983) 16,17,27

Table of Authorities Continued

Page

McCarty v. Henson, 749 F.2d 1134 (5th Cir. 1984) 23

McCord v. City of Fort Lauderdale, 617 F.Supp. 1093 (S.D. Fla. 1985) 17,24

McIntosh County NAACP v. City of Darien, 605 F.2d 753 (5th Cir. 1979) 22

Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980) 15,19,25

Overton v. City of Austin, Slip Op., No. A-84-CA-189 (W.D. Tx. March 12, 1985) 17

Perkins v. City of West Helena, 675 F.2d 201 (8th Cir. 1982), *aff'd. mem.*, 459 U.S. 801 (1983) .. 17,26

Political Civil Voters Organization v. City of Terrell, 565 F.Supp. 338 (N.D. Tx. 1983) 15

Rawl v. United States, Slip Op., No. 84-2333 (4th Cir. Dec. 4, 1985) 11

Riddick v. School Board of City of Norfolk, Slip Op., No. 83-326N (E.D. Va. 1984), *aff'd.*, No. 84-1815 (4th Cir. Feb. 6, 1986) 20,28

Rogers v. Lodge, 458 U.S. 613 (1982) ..... *passim*

Seastrunk v. Burns, 772 F.2d 143 (5th Cir. 1985) 11

Sierra v. El Paso Indep. School Dist., 591 F. Supp. 802 (W.D.Tx. 1984) 21

Taylor v. Haywood Co., Tenn., 544 F.Supp. 1122 (W.D. Tenn. 1982) 18

Terrazas v. Clements, 581 F.Supp. 1329 (N.D. Tx. 1984) 15,16

United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) 15

United States v. Dallas County Commission, 548 F.Supp. 875 (S.D. Ala. 1982), *rev.*, 739 F.2d 1529 (11th Cir. 1984) ..... *passim*

Table of Authorities Continued

Page

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Velasquez v. City of Abilene, 725 F.2d 1017 (5th Cir. 1984) 11

Washington v. Finlay, 664 F.2d 913 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982) 24

White v. Regester, 412 U.S. 755 (1973) ..... *passim*

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd. sub nom. East-Carroll Parish School Board v. Marshall*, 426 U.S. 636 (1976) 10,23

STATUTES:

Voting Rights Act of 1965, 42 U.S. § 1973 . *passim*

RULES:

Fed. R. Civ. P. 52(a) ..... *passim*

LEGISLATIVE HISTORY:

S. Rep. No. 417, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 177 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1300

HERBERT M. COLLINS, *et al.*,

Petitioners,

v.

CITY OF NORFOLK, VIRGINIA *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of the City of Norfolk, Virginia, the individual members of Norfolk City Council, the Norfolk Electoral Board and its individual members, all respondents herein and defendants below, in opposition to the petition of Herbert M. Collins, et al., for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the Eastern District of Virginia, Norfolk Division.

STATEMENT OF THE CASE

This action filed on August 12, 1983, alleged that the provisions in the Norfolk City Charter adopted sixty-five years earlier for the at-large election of members of Norfolk City Council were violative of the 14th and 15th

Amendments of the Constitution, of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and of 42 U.S.C. §1983. A ten-day bench trial began May 21, 1984, and concluded June 5, 1984.[1] After requesting and receiving post-trial briefs, the District Court filed a 76-page memorandum opinion (60 pages of Petitioners' Appendix) which included 61 pages of detailed findings of fact considering each of the evidentiary factors set forth in the Senate Report to Amended Section 2 as well as noting other relevant factors which demonstrated that there was no statutory violation.[2]

Petitioners having omitted from their petition any reference to the voluminous evidentiary findings supporting the District Court's ultimate factual conclusion that, based upon the "totality of circumstances", black citizens in Norfolk have an equal opportunity to participate in the political process and to elect representatives of their choice, Respondents are constrained to bring a few of these findings to the Court's attention.

Although Norfolk's black citizens comprised only 24.07% of the voting age population (VAP) in 1970, and 31.48% of the VAP in 1980,[3] throughout the past decade, as the District Court found, always *two* and sometimes *three* members of Norfolk's seven member council were sitting who had received the support of a majority of black voters

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[1] Over 2,100 pages of trial transcript were taken of the testimony of 22 witnesses with depositions or testimony of 12 additional witnesses and over 590 exhibits submitted. (*See* App. 3a). (Appendix and Record references herein will conform to Petitioners'abbreviations.)

[2] (App. 26a-69a). Additionally, the District Court considered in detail Petitioners' Constitutional claims and found that the at-large electoral system in Norfolk was neither adopted nor maintained with the intent of discriminating against the black citizens of Norfolk. (*See* App. 27a-32a; 79a-80a). Petitioners did not appeal these Constitutional claims to the Court of Appeals.

[3] While total black population was 35.2% in 1980 it was but 28.3% in 1970, not "historically. . .one-third black or more" as Petitioners assert. (Pet. 3). *See* App. 26a; Ex. D-107.

in their last election. (App. 66a). From 1968 until 1984, City Council has *continuously* included one black member and since 1984, two black members. (Pretrial Stip. 46; App. 50a). During six of those years one black member has been Vice Mayor, appointed by his fellow councilmen.[4]

Petitioners make no mention whatsoever of the crucial role that the Concerned Citizens of Norfolk ("CCN") have played in Norfolk politics, a role which was discussed in detail by the District Court and noted by the Court of Appeals. As found by the District Court, the CCN "has become the most influential black political organization in Norfolk" (App. 64a), and as noted by the Court of Appeals, it "wields considerable clout." (App. 6a). Petitioners admitted at trial the CCN's endorsement is "tantamount to considerable black support."[5]

The importance of CCN endorsement is reflected in the black votes for the candidates it endorses. Since 1974, no black candidate for City Council has won a *majority* of the votes in homogeneous *black* precincts without CCN endorsement, and yet with such endorsement *both black*

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[4] (App. 50a). In addition to now eighteen years of continuous black membership on Norfolk City Council, one black citizen served continuously on Norfolk's seven member delegation to the Virginia House of Delegates from 1969 until 1983, Dr. William P. Robinson, Sr., and William P. Robinson, Jr. In 1983, Robert Washington did not seek reelection from the 89th District and Yvonne Miller, a black citizen, then unopposed, became the second black member on Norfolk's five member House delegation. In 1981, David Mapp, a black citizen, was elected at-large to the office of Sheriff, a constitutional office, defeating three white challengers. (App. 51a-52a).

[5] *See* Tr. 168-169. Founded in 1960 by Dr. William P. Robinson, Sr. and by Joseph A. Jordan, Jr., who served on Norfolk City Council from 1968 until 1977 when he left council to assume a judgeship, it was led at the time of the trial by William P. Robinson, Jr., and by Mrs. Evelyn T. Butts. (App. 64a).

and white candidates have routinely done so.[6] The influence of the CCN is also found in its success rate. From 1970 to the present, the City Council has always included at least *two* members, and sometimes *three* members, who were elected with the support of CCN (Pretrial Stip. 56; App. 66a). As the Court of Appeals noted, from 1972 through 1984, CCN has endorsed 21 candidates, both black and white, for City Council; thirteen (62%) have been elected, of whom five were black and eight white, despite the fact that black citizens comprised at most 31.48% of the VAP.[7]

Not only have Norfolk's black citizens exercised enormous influence in City Council politics through CCN but as individual voters they have outperformed white voters on the two measures recognized by political scientists, including Petitioners' experts (Tr. 706; 969), as key determinants of political participation, registration and turnout. Using Petitioners' own statistics, the Court found that black registration and turnout rates *exceed* those for white citizens, white registration being at 53.1% and black reg-

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[6] For instance, the District Court noted in its opinion that in 1974 CCN endorsed two white candidates--Elizabeth Howell and Claude Staylor—and one black candidate, Lenious Bond for council. Three other black candidates including Petitioner Milton Reid were running without CCN endorsement in a total field of 21, (App. 64a-65a). Without CCN endorsement, Dr. Reid received votes from only 36.4% of the voters in homogenous *black* precincts compared to Mr. Staylor and Mrs. Howell who each received over 56% and Mr. Bond who received 73.4%. (Ex. D-470F). The same pattern occurred in the 1980, 1982 and 1984 City Council elections, as the District Court found (App. 65a-66a) and in the 1982 House of Delegates race. (Tr. 180-181; 1705-1707). Four of the seven individual Petitioners and their co-counsel herein, Mr. Gay, ran for public office *without* CCN endorsement and *none received the support of a majority of the voters in homogeneous black precincts* in those elections. (App. 40a; Ex. D-470).

[7] App. 6a. Six of the seven present members of council were endorsed by CCN in at least one of their campaigns. (App. 66a).

istration at 55.3%.[8] Again, using Petitioners' own figures, black turnout rates by homogeneous precinct analysis *exceeded* white turnout rates in the City Council elections in 1980, 1982 and 1984,[9] with the black turnout rate *exceeding* the white turnout rate in 1984 by 11 percentage points.[10]

Norfolk does *not* have numbered post, majority vote or anti-single shot electoral mechanisms, all of which tend to create head-to-head contests and thus render more difficult the election of a minority candidate. Norfolk has a simple plurality-win system in which voters may vote for any number of seats from a typically large field of candidates. (Pretrial Stip. 52). The District Court found that in every City Council election from 1968 to the present the percent of the vote received by the candidate with the lowest winning total has been *less* than 50% and in four of the elections it has been below 45%. (App. 42a). Under this system, therefore, a black candidate does not need substantial white cross-over votes to reach the threshold of victory. (Tr. 1954).

In 1982 when 89.7% of total white *votes* cast were divided among ten white candidates (Pet. 3), 31.1% of all white *voters* crossed over to vote for Reverend Joseph

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[8] Petitioners' figures excluded the population on Norfolk's Naval bases and ships home ported in Norfolk despite the fact that they are included in the population by the Bureau of Census and by the State for legislative redistricting. *See Davis* v. *Mann*, 377 U.S. 678, 691 (1964). As the Court of Appeals noted, "[h]ad they been included, the statistics would have been even more striking as to black predominance" (App. 6a) with a white registration rate of 37% and a black rate of 57%. (App. 34a).

[9] Ex.P-50b; P-215. Under Petitioners' regression analysis the black turnout rate was higher in 1982 and 1984. *Id.* Far from being "episodic" (Pet. 12), under one alternative analysis performed by Petitioners' experts, black turnout rates exceeded white turnout rates as early as 1976. (Ex. D-103; Tr. 705).

[10] (App. 34a). Further, as the District Court noted, Norfolk's black citizens have been active in party politics. (App. 66a).

Green as one of their four choices and as many as 49% of white *voters* may have crossed over to vote for all black candidates. (Ex. D-474). In 1984, as many as 57% of all white voters may have voted for black candidates and 63% of all black voters may have voted for white candidates. *Id.* As Petitioners' experts admitted and as the District Court recognized (Tr. 846; App. 40a), *none* of the three winning candidates in 1984 (one black, two white) would have been elected without the support received from both black and white voters. The District Court also found a high correlation between incumbency and election to Norfolk City Council. From 1968 through 1984, the incumbency success rate was 79% with every black incumbent who has sought reelection being reelected. (App. 37a).

The evidence disclosed that the white members of City Council have generally run alone and not on a ticket with other candidates. They often were endorsed by black organizations such as CCN.[11] In 1984, the overlapping tickets were biracial and demonstrated coalition or consensus politics. Evelyn Butts (black), Reverend John Foster (black) and Joseph Leafe (white) were endorsed by CCN and Reverend Foster and Elizabeth Howell (white) were endorsed by the Rainbow Coalition, another black endorsement group.

The findings above comprise only a portion of the detailed findings made by the District Court from the trial record. On appeal to the United States Court of Appeals for the Fourth Circuit, Petitioners made two primary arguments: first, that the District Court judge demonstrated "bias and hostility toward plaintiffs' case" and was, therefore, prejudiced and, second, that the District Court's findings as to the Voting Rights Act were "clearly erroneous" under Rule 52(a), Fed.R.Civ.P., and that the "evidence

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[11] (Pretrial Stip. 55; Ex. P-13, p. 10, Ex. P-14, pp. 7-8; Ex. P-15, pp. 10, 13-15; Ex. P-17, pp. 6-7; Ex. D-479; Ex. D-480).

compels a finding" that there was a violation.[12] The entire appellate panel rejected Petitioners' first argument although, as to this, the dissent raised the argument that the District Court misconstrued the proviso to Section 2 of the Voting Rights Act (that there is no right to proportional representation), an argument which the panel majority specifically rejected. (*See* App. 9a, n.7). As to the second argument, the panel majority reviewed the evidence and the factual issues noted in the Senate Report to be considered under Amended Section 2 and concluded that under the standards of Rule 52(a) as recently explicated by this Court in *Anderson* v. *City of Bessemer, North Carolina*, 470 U.S. ___, 84 L.Ed.2d 518 (1985), the District Court's findings were not clearly erroneous. (App. 2a-9a). The dissent argued that the District Court misapplied some of the Senate Report criteria and raised a new point not previously argued by Petitioners, namely, that the District Court applied a definition of racial polarization that reinstated the intent test discarded by Amended Section 2. (App. 13a-14a).

Based upon the comments of the dissent, particularly those concerning racial polarization, Petitioners sought a rehearing and rehearing *en banc* and the Appeals Court called for briefs from both sides. Upon reviewing these additional briefs and finding no merit to Petitioners' new arguments, the petition for rehearing and rehearing *en banc* was denied.

After a thorough analysis of the "totality of circumstances" of the Norfolk electoral system and an "intensely local appraisal"[13] of political life in Norfolk by the District Court and after two reviews by the Court of Appeals, Petitioners now seek a third review of the District Court's

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[12] Petitioners' "Statement of The Issues Presented For Review" in their brief on appeal to the Fourth Circuit is set out in the Appendix to this brief.

[13] *See White* v. *Regester*, 412 U.S. 755, 769 (1973).

opinion and a fourth review of Petitioners' evidence. They now contend that the trial court "minimized the significance of plaintiffs' proof" (Pet. 7), and attempt to turn the factual inquiries suggested by the Senate Report into legal principles.

SUMMARY OF ARGUMENT

Petitioners have failed to meet any of the criteria governing the grant of a writ of certiorari stated in Rule 17 of the Supreme Court Rules. The Court of Appeals for the Fourth Circuit did not render a decision in conflict with the decision of another federal Court of Appeals on the same matter and did not decide a federal question in a manner conflicting with decisions of this Court nor are other special and important reasons presented by Petitioners. The legislative history to Amended Section 2, the decisions of the Courts of Appeals which have considered the question and the holdings of this Court are in concurrence that the ultimate determination of whether in the "totality of circumstances" a particular voting practice or procedure results in denying minority groups equal opportunity to participate in the political process and to elect representatives of their choice is a question of *fact* subject to the "clearly erroneous" standard of Fed.R.Civ.P. Rule 52(a). The detailed opinion of the District Court considered each of the evidentiary factors suggested by the Senate Report, applying them to the specific situation *in Norfolk*, and the affirmance by the Court of Appeals was proper. Petitioners took issue in the Court of Appeals primarily with the District Court's factual conclusions but, to the extent that they argued that errors of law had been committed, Petitioners were provided two opportunities to raise such points and such arguments were properly rejected by the appellate panel. The analysis employed by the District Court and affirmed by the Court of Appeals is consistent with the decisions of this Court, other Circuits and the language and history of Amended Section 2, and no un-

resolved legal issues were raised requiring the intervention by this Court. In the final analysis, the decision rested upon a combination of facts unique to Norfolk, Virginia, which the District Court was in the best position to consider, and did so.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT PROPERLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD IN ITS REVIEW OF THE DISTRICT COURT OPINION

In order to garner this Court's review, Petitioners characterize the inquiry into the "totality of circumstances," under Amended Section 2 as one "involving 'mixed questions' of law and fact as to which the lower courts remain divided" (Pet. 13) and press for review under a less onerous standard than Rule 52(a) imposes. Their argument is simply incorrect.

When Congress amended Section 2 of the Voting Rights Act in 1982, it was against a background of case law which recognized the highly fact-specific nature of inquiries into the existence of political vote dilution. Based upon the language in this Court's decision in *White* v. *Regester, supra*, 412 U.S. at 769, the Act itself requires consideration of the "totality of circumstances" in each challenged jurisdiction in order to reach conclusions whether minorities have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[14] The Senate Report to Amended Section 2 lists seven "typical" and two additional "factors", but it makes clear that "there is no requirement that any particular number of factors be proved, or that

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[14] While §1973(a) sets out the legal rule, §1973(b) *is* the factual test to be applied to determine if there has been a violation of §1973(a). *See* App. 86a.

a majority of them point one way or another."[15] This Court in *White* was cognizant of the trial judge's "special vantage point" and stated that it was "not inclined to overturn these findings, representing as they do *a blend of history and an intensely local appraisal* of the design and impact of the . . . multimember district *in the light of past and present reality, political and otherwise.*" 412 U.S. at 769-70. (Emphasis added).

Prior to the amendment to Section 2, this Court made clear in *Rogers* v. *Lodge*, 458 U.S. 613 (1982), that the ultimate determination under the then prevailing standard in voting rights cases was a "pure question of fact," governed by the clearly erroneous standard of Rule 52(a) and reaffirmed this Court's traditional "reluctance to disturb" the District Court's conclusions when a Court of Appeals has affirmed them under the clearly erroneous standard.[16]

Subsequent to the passage of Amended Section 2, the Fifth Circuit (which has been instrumental in the formulation of much of the case law under the Voting Rights Act in the Courts of Appeals) noted the "intensely local appraisal" required in *White* and mindful of this Court's ruling in *Rogers*, held that the ultimate finding of discriminatory result under the Act is a finding of *fact*, not

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[15] Senate Report at 29. The *factors* in the Senate Report were derived primarily from the *facts* of *White, supra*, and the Fifth Circuit opinion in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). *See* Senate Report, at 28 n.113.

[16] As the *Rogers* decision stated,

> We are of the view that the same clearly erroneous standard applies to the trial court's finding in this case that the at-large system in Burke County is being maintained for discriminatory purposes, *as well as to the court's subsidiary findings of fact.* The Court of Appeals *did not hold any of the District Court's findings of fact* to be *clearly erroneous*, and this Court has *frequently noted its reluctance to disturb findings of fact concurred in by two lower courts.* (Emphasis added). 458 U.S. at 623.

the "mixed question of law and fact" suggested by Petitioners (Pet. 13), subject to the clearly erroneous standard of Rule 52(a).[17]

This Court's recent reversal of the Fourth Circuit in *Anderson* v. *City of Bessemer, supra*, only underscores the correctness of the Fifth Circuit's decision in *Velasquez* and the deference to be given to a District Court's ultimate conclusion that no illegal vote dilution exists.[18]

In the instant case, the District Court's detailed opinion considered not only the facts suggested by the Senate Report and weighed their relevance to the reality of *Norfolk* politics, but also considered the key role of endorsement groups such as CCN (the preeminant black group in Norfolk), participation in party politics, registration and turnout, and various political coalitions (App. 63a-66a) in analyzing the "totality of circumstances" and reaching its ultimate factual conclusion. After reviewing the record, the Court of Appeals majority found none of the District Court's determinations clearly erroneous and affirmed.

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[17] *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984), stated, "The Supreme Court has squarely held that the finding of intentional discrimination necessary in voting dilution cases under the Fourteenth Amendment . . . is factual, governed by Rule 52's clearly erroneous standard. [*Rogers* v. *Lodge*, 458 U.S. 613] We have *no doubt that the finding of discriminatory effect or result under the Voting Rights Act amendments of 1982 is also governed by the clearly erroneous standard*, and *while appellants try to argue that dilution cases involve a mixed question of law and fact not governed by the clearly erroneous standard, we cannot embrace this argument.*" (Emphasis added). *See Seastrunk* v. *Burns*, 772 F.2d 143, 151 (5th Cir. 1985). The Circuits are not in dispute on this issue and no question is presented for this Court's review.

[18] *Rawl* v. *United States*, Slip Op., No. 84-2333 (4th Cir., Dec. 4, 1985) does not support Petitioners' argument. (Pet. 14). There, Judge Murnaghan made clear he was reversing a mistake in the rule of law applied while in this case he correctly noted that the ultimate issue was one of fact. (App. 8a).

In a further attempt to avoid the standard of review mandated by Rule 52(a) for the ultimate factual conclusions under the "totality of circumstances," Petitioners divide the whole into parts, asserting that the District Court misapplied six of the Senate Report factors through erroneous definitions or "gave no weight to factors which Congress considered important." (Pet. 12). Petitioners assert that the Court of Appeals "failed to review [these] fundamental errors" and, hence, that this Court should start afresh. *Id.* Petitioners' analysis is incorrect for the simple reason that the District Court, as shown abundantly by the record, did consider the evidence in light of the Senate factors.[19]

The evidentiary factors in the Senate Report, however, are simply not immutable legal principles, as Petitioners suggest, whose presence mandates dilution or which have definitions applicable in every case. As the panel majority stated, "The lesson to be derived is that any particular aspect of the voting process need not be absolutely good or bad. Rather, the application in the particular case should control and we should eschew generalities."[20] Moreover,

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[19] *Compare* Petitioners' criticism of the District Court for failing "to credit the plaintiffs with establishing *any* of the factors," (Pet. 7-8) (emphasis in original), with Brief for The Lawyers Committee For Civil Rights Under Law and The American Jewish Committee As Amici Curiae Supporting Appellees in *Thornburg* v. *Gingles*, No. 83-1968, at 11 ("with the single exception of denial of access to a candidate slating process, *the district court found that all of the factors specified in the Senate Report existed or were present . . . In light of these findings of fact*, the district court properly concluded that the signposts for vote dilution. . .all pointed to [a violation]." (Emphasis added).

[20] (App. 5a, n5). For example, courts have applied numerous tests to determine the presence of racial polarization depending on the circumstances, *see, infra*, at 16, and, indeed, Petitioners acknowledge racially polarized voting to be an "evidentiary factor." (Pet. 16). Moreover, while Petitioners complain, for instance, that the District Court treated the existence of staggered terms and lack of residency requirements as "insignificant," (Pet. 12), the Court did so only after a careful

the suggested factual touchstones in the Senate Report cannot be viewed in isolation, as Petitioners have done, but rather must be considered within the overall political framework to resolve, as the District did, the ultimate factual inquiry.[21]

II. THE DISTRICT COURT'S ANALYSIS OF THE FACTS WAS A PROPER APPLICATION OF THE SECTION 2 "RESULTS TEST"

In this Court, Petitioners seek to cast the District Court's analysis on two factors in terms of an "intent" concept alleged to be inconsistent with the language or legislative history of Amended Section 2 and to discern other "incorrect legal standards" applied by the District Court. These same arguments, although ancillary to Petitioners' main theories below, were considered by the Court of Appeals and properly rejected.

A. The District Court's Analysis of Racially Polarized Voting Is Fully Supported By The Authorities

During the trial of this action, experts for both parties offered political science tools to measure whether City Council elections in Norfolk were racially polarized with differing application and results. Petitioners' expert Dr. Engstrom offered a test that would find racial polarization wherever one racial group votes contrary to the majority of another racial group. (App. 35a). As the District Court found and as Dr. Engstrom admitted, under this overly broad definition most of the elections in this country would be racially polarized. (App. 35a; Tr. 994, 1852). More importantly, however, the District Court found that this definition "would be more appropriate in a head-to-head race than in an election such as that for the Norfolk City Council in which a voter may select more than one candidate.

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analysis of their impact *in Norfolk*, (App. 42a-43a; 71a-72a), an analysis noted by the Court of Appeals. (App. 5a n.4-5).

[21] *See* Senate Report *id.* at 29 n.118.

A vote for one candidate is not necessarily a vote against another candidate." (App. 35a).

Respondents' expert Dr. O'Rourke offered a test which the District Court found to be more applicable to the "multiple-candidate, multiple-office Norfolk City Council elections." (App. 35a). In the words of the District Court, Dr. O'Rourke suggested that three factors should be "*examined*" in order to determine whether racially polarized voting has occurred. (App. 35a; 39a).

> First, the presence or absence of "white backlash," that is, whether white voters turn out in greater numbers than usual in response to the potential election of black candidates. Second, the voting patterns of black and white voters over a period of years. Finally, whether whites attempt to limit the field of candidates. (App. 35a).

Petitioners argue that to even look at white backlash and limitations on the field of candidates is "idosyncratic," unsupported in the law and is an attempt to reinstate the intent test since it reaches voter motivation. (Pet. 16-17). Petitioners are wrong on all counts.

To begin with, the intent test eschewed by Congress in amending Section 2 of the Voting Rights Act concerned only the intent of the government officials in adopting or maintaining the electoral system, *not* the motivation of voters in choosing a candidate.[22] Whether a voter is choos-

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[22] The Senate Subcommittee Report noted: "It is irrelevant what the intent may have been of *'long dead'* legislators if the alleged discriminatory action is being *maintained wrongfully by present legislators.*" Senate Report, at 179. (Emphasis added). *See also* "Additional Views" of Senator Dole ("the motives behind the actions of officials"). *Id.* at 193. Commentators also interpreted the intent required by *Bolden* in the same light, including Petitioners' counsel of record. *See* Frank R. Parker, "The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard," 69 Va. L. Rev. 715, 740 (1983). ("Proving discriminatory intent *ultimately requires a determination of*

ing a candidate because of his race as opposed to incumbency or some other nondiscriminatory reason has always been an issue in results test decisions, both prior to the amendment to Section 2 and subsequently.[23] The Senate Report made clear that whether "race is the predominant determinant of political preference" must be considered.[24]

As stated in *Nevett* v. *Sides*, 571 F.2d 209, 223n.16 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980), relied upon by Petitioners (Pet. 18),

> If racially polarized voting did not exist, white candidates could not expect to retain or achieve office solely *because they were white* . . . [B]lack

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what was in the minds of legislators who enacted or retained a voting law alleged to be discriminatory. . .")(Emphasis added).

[23] As this Court noted in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 166 (1977), the question is whether there is "voting for or against a candidate *because* of his race." (Emphasis added). This has also been the position in cases arising out of the Fifth and Eleventh Circuits. *See Jones* v. *City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) ("the inquiry is whether race or ethnicity was such a determinant of voting preference"); *U.S.* v. *Marengo Co. Comm.*, 731 F.2d 1546, 1567 (11th Cir. 1984) ("race is the main issue in Marengo Co. politics"); *Lee County Branch NAACP* v. *City of Opelika*, 748 F.2d 1473, 1482 (11th Cir. 1984) (quoting from *Jones* v. *City of Lubbock, supra*, at 234); *Terrazas* v. *Clements*, 581 F.Supp. 1329, 1345n.25 (N.D. Tx. 1984) ("racial bloc voting suggests that minority candidates lose precisely because of their race"); *Political Civil Voters Organization* v. *City of Terrell*, 565 F.Supp. 338, 348 (N.D. Tx. 1983) ("Racially polarized voting occurs when race is a predominant factor and influence in voter choice").

[24] The Senate Report states, at 33, "The Subcommittee Report claims that the *results test assumes 'that race is the predominant determinant of political preference.'* The Subcommittee Report notes that in many cases racial bloc voting is not *so* monolithic, and that minority voters do receive substantial support from white voters. *That statement is correct, . . . and in those communities, it should be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test.*" (Emphasis added).

candidates could not be denied office *because they were black*. (Emphasis added).

The key to determining whether voting is polarized on the basis of race is to look at all possible explanatory factors for voting patterns inasmuch as the purpose of the Voting Rights Act is, in the words of the Act, to determine if there has been a denial or abridgement of the right to vote "on account of race or color," not on the basis of political preference or some other non-racial factor. While the statistical correlation between the votes received by a candidate and the racial composition of a precinct may be considered in attempting to determine whether voting is on the basis of race,[25] those courts which have addressed the problem have not found such evidence alone to be sufficient but also have considered evidence through both expert and lay witnesses of the context of the elections in the particular jurisdictions.[26]

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[25] Despite Petitioners' suggestions to the contrary (Pet. 18), there is simply *no* one statistical methodology universally recognized as providing a threshold test above which racial polarization must be found and below which it must not, the courts using a variety of measures. *See, e.g., City of Port Arthur* v. *United States*, 517 F. Supp. 987 (D.D.C. 1981), *aff'd.*, 459 U.S. 159 (1982) (polarization score); *United States* v. *Dallas Co. Comm.*, 739 F.2d 1529 (11th Cir. 1984) (polarization index); *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983) (regression analysis). The Senate Report certainly provides no hint of any such test, and the two decisions from which the Senate Report factors were derived, this Court's opinion in *White, supra*, and the Fifth Circuit opinion in *Zimmer, supra*, do not even mention polarization.

[26] *See e.g., Terrazas* v. *Clements, supra*, at 1353 ("poor financing, failure to obtain endorsements, . . . incumbency"); *Leadership Roundtable* v. *City of Little Rock*, 499 F.Supp. 579, 587 (E.D. Ark. 1980) ("name recognition, reputation, political philosophy, stand on issues"). As cautioned by Judge Higginbotham, in *Jones* v. *Lubbock, supra*, 730 F.2d at 234, in determining whether race was a determinant of voting preference, "there is a risk that a seemingly polarized voting pattern in fact is only the presence of mathematical correspondence of race to loss inevitable in such defeats of minority candidates. . . . Nor will math

To suggest that consideration of "white backlash" and "limitations on the field of candidates" as tools to determine the existence of racial voting preference is "homespun" ignores the substantial body of case law in which they have been considered, *including* the cases relied upon by Petitioners. (Pet. 16-18). For instance, in *City of Rome* v. *United States*, 472 F.Supp. 221 (D.D.C. 1979) (three-judge court) *aff'd*, 446 U.S. 156 (1980), one of the major facts considered by the District Court in its determination of the existence of racially polarized voting was the fact that a black candidate, Reverend Hill, while defeating three white challengers in a primary was defeated in the general election by a high turnout of white voters, i.e., by white backlash.[27] Other decisions have looked to limitations on the field of candidates as indicative of polarized voting.[28]

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models always furnish an answer. A healthy dose of common sense and intuitive assessment remain powerful components to this critical *factual inquiry*. For example, a token candidacy of a minority unknown outside his minority voting area may attract little non-minority support and produce a high statistical correspondence of race to loss. Yet, one on the scene may know that race played little role at all." (Emphasis added).

Judge Higginbotham's analysis was embraced recently by the Eleventh Circuit in *Lee County Branch NAACP* v. *City of Opelika*, *supra*, at 1482, and more recently in *Overton* v. *City of Austin*, Slip Op., No. A-84-CA-189 (W.D. Tx. 1985) and *McCord* v. *City of Fort Lauderdale*, 617 F. Supp. 1093, 1102 (S.D. Fla. 1985).

[27] 472 F.Supp. at 227. This Court's affirmance pointed specifically to the evidence of Reverend Hill's defeat as indicating "the presence of racial block voting." 446 U.S. at 184 n.20. *See also Major* v. *Treen*, *supra*, 574 F. Supp. at 338 ("as blacks have begun to gain access to elective office, white voters have rallied in increasing numbers to vote for candidates of their race") and *City of Petersburg* v. *United States*, 354 F.Supp. 1021, 1026 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), cited by Petitioners.

[28] In *Perkins* v. *City of West Helena*, 675 F.2d 201, 203 (8th Cir. 1982), *aff'd mem.*, 459 U.S. 801 (1982), cited by Petitioners, the Circuit Court noted that only three black candidates had ever been elected to city council and in each case the candidate ran against two white

While Petitioners take issue with the fact that the District Court below cited only the District Court opinion in *United States* v. *Dallas County Commission*, 548 F.Supp. 875 (S.D. Ala. 1982), *rev.*, 739 F.2d 1529 (11th Cir. 1984), as authority for consideration of white backlash and limitations on the field of candidates (Pet. 18-19), those elements did not originate with that case, and the reversal by the Eleventh Circuit was not on the basis of the definition employed.[29] *Dallas County* relied upon the District Court opinion in *Bolden* v. *City of Mobile*, 423 F.Supp. 384, 388 (S.D. Ala. 1976), the decision whose reversal by this Court, 446 U.S. 55 (1980), resulted in the amendment to Section 2. The District Court in *Bolden* analyzed polarization in terms of

> white voting for white and black for black if a white is opposed to a black; or if the race is between two white candidates and one candidate is identified with sponsoring particularized black needs. *When this occurs, a white backlash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks.* (Emphasis added).

Additionally, the District Court in *Bolden*, identified attempts by white candidates to limit the field so "as not to splinter the white vote," *id.* at 388, as well as considering statistical evidence as to voting patterns. *Id.*[30] Sim-

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candidates, but "when these black incumbents stood for reelection, each was opposed by only one white candidate, and in each instance the black was defeated." *See Taylor* v. *Haywood Co.*, 544 F.Supp. 1122, 1127 (W.D. Tenn. 1982).

[29] The Circuit Court in *Dallas County* took exception only with the District Court's conclusion, without supporting evidence, that *apathy* was the prime cause of black defeat at the polls. 739 F.2d at 1536.

[30] Certainly, this Court did not view the polarization analysis by the District Court in *Bolden* as an "intent test" because the plurality found the evidence under the "Zimmer" factors "insufficient to prove . . . a

ilarly, the District Court in the case at bar did more than simply look at "backlash" and limitations on candidates. It analyzed voting patterns and concluded (based on evidence in hundreds of pages of transcript and numerous exhibits) that "voting patterns in Norfolk City Council elections do not reflect racial polarization." (App. 36a-41a). Having the "opportunity to judge the credibility of the witnesses" for which "due regard shall be given" under Rule 52(a) (App. 87a), the District Court took issue with the failure of Petitioners' experts to consider numerous factors in their analysis which bore on the persuasiveness of their conclusions. (App. 37a-39a).[31] Certainly such findings comport with the requirements of Rule 52(a) and must be affirmed on appeal.

B. The District Court's Detailed Findings On The Issue Of Responsiveness Were Fully Supported

Notwithstanding the lesser importance of this factor in the Senate Report,[32] Petitioners made sweeping charges

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discriminatory purpose" *id.* at 73, since intent to discriminate required much more, *i.e.*, that the "disputed plan was conceived or operated as a purposeful device to further racial . . . discrimination." *See id.* at 74 n.20-21. The *Bolden* District Court analysis was also quoted in *U.S.* v. *Marengo Co. Comm.*, 469 F.Supp. 1150, 1162 (S.D.Ala. 1979) *rev. on other grds., supra* (Appellate Court noted, however, that District Court found polarized voting) and cited in *Nevett* v. *Sides, supra*, 571 F.2d at 223, n.18.

[31] While Petitioners seek to cast their experts as an "experienced analyst" and as a "national authority on minority vote dilution" (Pet. 4), the credibility of their evidence on the issue of polarization in this case was eroded, as the District Court found, by numerous methodological problems including failure to consider over 38,000 Norfolk citizens living on Naval bases and ships. (App. 37a-38a). Petitioners' experts never considered the role of incumbency nor the crucial impact of CCN and other endorsement groups on voting behavior. (Tr. 1000-1001). Dr. Engstrom (who had relied on Mr. Brace's data) put great distance between himself and Mr. Brace (Tr. 943, 945-946; 948), began his own study only two weeks before trial, and only looked at *three* elections (as compared to Respondents experts' *nine* and *excluding* 1984) (Tr. 937; 1006; Ex. P-216). Conspicuous by its absence in Petitioners' brief is any mention of Mr. Peterson whose testimony pointed out many errors in Petitioners' statistics (Tr. 491-582).

[32] The Senate Report addresses the issue of unresponsiveness in terms

of unresponsiveness and Respondents countered with overwhelming evidence of the City's responsiveness to the needs of its black citizens.[33] The District Court spent fourteen of its seventy-eight page opinion (App. 52a-62a) analyzing each of Petitioners' contentions under the requirements of Rule 52(a), some of which were noted by the panel majority, and the standards the District Court applied (App. 76a-77a) fully comport with the requirements of Amended Section 2.

Despite detailed findings of responsiveness, Petitioners seek again to avoid the "clearly erroneous" standard of Rule 52(a) by plucking out *one* comment on *one* finding by the District Court and suggesting the District Court applied an "intent test." (Pet. 20). The District Court's finding that the City's housing policies in East Ghent were not "racially motivated" responds directly to Petitioners' allegations that the City's *policies* themselves were discriminatory.[34] The Court, however, did more than find that Norfolk's housing policies were not "racially motivated" but it additionally found that the City's housing policies were responsive to the needs of Norfolk's black citizens

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of "*significant* lack of responsiveness" (emphasis added) and while "unresponsiveness is not an essential part of plaintiff's case . . . should plaintiff choose to offer evidence . . ., then the defendant could offer rebuttal evidence." Senate Report, *supra*, at 207.

[33] In terms of volume, no other issue filled as much space in the record as responsiveness. Petitioners presented approximately 90 exhibits and, once the issue was raised, Respondents had to respond with approximately 290 exhibits.

[34] (App. 60a). Additionally, the District Court found that the decision not to relocate low income families into new housing in East Ghent was due to a halt in the federal programs under which this was to be carried out and the decision was consistent with the City's efforts to revitalize the inner city tax base, an assessment approved by the Area Director for HUD. (App. 58a-61a). This same claim of intentional discrimination in housing relocation was raised by the plaintiffs in *Riddick, et al.* v. *School Board of the City of Norfolk*, No. 83-326N (E.D. Va. 1984), *aff'd*, No. 84-1815 (4th Cir. Feb. 6, 1986) and rejected.

by replacing slum housing with "decent safe and sanitary" low income housing on a one-for-one basis. (App. 59a-60a).[35] The District Court considered each of Petitioners' factual allegations and its findings, as the Court of Appeals noted, met the requirements of Rule 52(a) and certainly were not clearly erroneous.

C. The District Court Properly Analyzed The Factors

1. Slating Process.

Without offering a definition of their own, Petitioners assert that the District Court applied a "narrow definition" of a slate which caused the District Court to disregard their "considerable evidence" that an "all-white 'westside businessmen's coalition' existed which slated and promoted white candidates only." (Pet 21). To the contrary, the District Court relied on precisely the same authorities as did Petitioners for its analysis of a discriminatory slating process and its determination is fully supported by those cases which have considered the issue. *Compare* App. 72a-73a with Pet. 21.[36]

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[35] The District Court also found (1) that Norfolk's black citizens were well represented on the major boards and commissions whose members were appointed by City Council, and well represented in Norfolk's municipal work force; (2) that Norfolk's municipal departments were responsive to the needs of Norfolk's black citizens; and (3) that since 1975 Norfolk used nearly $100 million in federal grants to provide services to low and moderate income residents. (App. 53a-54a; 61a).

[36] This Court in *White* noted that only two black citizens had served from Dallas County in the Texas House of Representatives and were the only two black citizens ever slated by the DCRG, "a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County," and stated that "it is extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination without the endorsement of the [DCRG]." *Id.*, at 767 n.11. *See also Leadership Roundtable* v. *City of Little Rock, supra*, 499 F. Supp. at 589, (groups "controlling access to the ballot for positions on the Board of Directors") and *Sierra* v. *El Paso Indep. School Dist.*, 591 F.Supp. 802, 809 (W.D.Tx. 1984).

This Senate Report factor considers first whether the political subdivision has a "slating *process*" not simply whether some candidates run together on tickets and secondly whether minority groups have been denied access to that process. The evidence disclosed that in Norfolk most City Council members have run alone or with the support of CCN and not through a slating process or under the aegis of some slating organization. *See* discussion, *supra*, at 6. The Court found expressly that no group of white Norfolk citizens, including the so-called "westside business coalition", controls access to the ballot (App. 73a) and found "no evidence that any potential black candidate had ever been dissuaded from seeking election by fear of reprisals from any members of the white community." (App. 73a).

Petitioners could point to only two elections (1976 and 1980) and three candidates (Phillips, Thomas and later Leafe) as allegedly slated by the so-called "westside business coalition." (App. 44a-45a). This is far from the pervasive control noted in *White* v. *Regester* and other decisions. No matter how a slating process is defined, the District Court found specifically that "plaintiffs' theory, that this so-called 'westside businessmen's coalition' is controlling the Norfolk City Council elections, is not supported by credible evidence.[37] As noted earlier, the most

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In order to assure control, slating groups usually run candidates for each seat, a method which prevents minorities from slipping into a position by default. In *United States* v. *Marengo Co. Comm.*, *supra*, at 1569, relied upon Petitioners throughout their petition, the issue was whether there was an "informal slating process that *ensured a white candidate for every office.*" (Emphasis added). In a decision cited by the District Court as well as by Petitioners, the Fifth Circuit noted that relevant to the inquiry of the effectiveness of the slating organization is fear of black citizens to seek office because of economic reprisal. *McIntosh County NAACP* v. *City of Darien*, 605 F.2d 753, 758 (5th Cir. 1979).

[37] (App. 45a). The so-called "slates" relied upon by Petitioners were

successful of any endorsement group has been CCN whose success would not be possible in an environment where a discriminatory slating group controlled access to council. The findings of the District Court negated any suggestion of a discriminatory slating process under *any* legal test and its findings cannot under any view be clearly erroneous.

2. History of Official Discrimination.

The District Court made extensive findings as to this factor and determined that despite a past history of discrimination in Virginia, there are no lingering effects of that discrimination which prevent Norfolk's black citizens from participating in the electoral process today and that black citizens in Norfolk participate equally with white citizens.[38] Notwithstanding these findings, Petitioners argue that the District Court improperly concluded that "recent increases in black registration and turnout negated Virginia's past history of discrimination." (Pet. 22).

First of all, the District Court did *not* rely *solely* on registration and turnout figures to show no lingering effects but noted also the fact that at least one black candidate has run in every Norfolk City Council election since 1964 (and elsewhere found at least one sitting on Council continuously since 1968) and that black citizens have actively participated in the political process through the Concerned Citizens and the City Democratic Party. (App. 70a).

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certainly no barrier to effective black supported candidacies. The Phillips/Thomas ticket did not prevent Joseph Jordan's election in 1976, and in 1980, Phillips lost while Mrs. Howell who received 73% of the black vote won. (Ex. D-470).

[38] (App. 32a-35a; 69a-70a). Case law is clear that any history of past discrimination in the areas of registration, voting and political participation must be tied to lower political participation *today*. *See Kirksey* v. *City of Jackson*, 461 F.Supp. 1282, 1291 (S.D. Miss. 1978), *vacated on other grds.*, 625 F.2d 21 (5th Cir. 1980); *Zimmer* v. *McKeithen*, *supra*, at 1305; *McCarty* v. *Henson*, 749 F.2d 1134 (5th Cir. 1984) and *Chapman* v. *Nicholson*, 579 F.Supp. 1304, 1513 (N.D.Ala. 1984).

Secondly, the evidence disclosed not just "recent increases" in black turnout and registration, as Petitioners describe it (Pet. 22), but rather black registration rates *exceeding* white registration rates by two percentage points and black turnout *exceeding* white turnout by eleven percentage points using Petitioners' own numbers. (App. 34a)[39] Finally, the decisions relied upon by Petitioners to denigrate the importance of high black registration and turnout do not support their position.[40]

As the District Court found, by all well recognized measures of political participation—registration, turnout, candidacy and political parties and endorsement group ac-

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[39] Petitioners' experts admitted that turnout and registration rates were very important in measuring political participation. (Tr. 706; 969). The high turnout and registration rates for Norfolk's black citizens which exceed those for Norfolk's white citizens may be contrasted with the situation in *Thornburg* v. *Gingles*, in which the three judge court noted that the *white* registration rate exceeded the *black* registration rate by 14 percentage points. *Gingles* v. *Edminston*, 590 F. Supp. 345, 360 (E.D. N.C. 1984), appeal pending, *sub nom Thornburg* v. *Gingles*, No. 83-1968. While Petitioners' counsel ask this Court now *not* to consider the District Court's finding of high black turnout and registration in Norfolk as showing no lingering effects of official discrimination, in their amicus brief in *Thornburg* v. *Gingles* they pointed specifically to the low registration rates in North Carolina as being the result "of the long period of official state denial and chilling of black citizen's registration efforts." Lawyers' Committee Amicus Brief, at 11.

[40] For instance, in *United States* v. *Marengo County Comm.*, *supra*, 731 F.2d at 1567, the Eleventh Circuit noted that "past discrimination may cause blacks to register or vote in lower numbers than whites" while the Fifth Circuit in *United States* v. *Dallas County Comm.*, *supra*, at 1538, also noted that black turnout rate was between 5 and 10 points lower than the white rate which suggested that "somewhat lower registration rates and lower turnout rates may show that the effects of past discrimination still linger." *See also Washington* v. *Finlay*, 664 F.2d 913, 922 (4th Cir. 1981), cited by Petitioners ("though most assuredly excluded in the past . . . blacks . . . *are registered and vote . . . in proportions comparable to whites*"); and *McCord* v. *City of Fort Lauderdale*, *supra*, 617 F. Supp. at 1099.

tivity—black citizens of Norfolk are participating equally with white citizens and today there are no lingering effects of any earlier official discrimination. The Court's analysis is consistent with prior decisions and presents no issues for this Court to resolve.

3. Discriminatory Electoral Mechanisms

Petitioners point to three so-called enhancing factors—size of the election district, staggered terms and no residency requirements—all of which the District Court analyzed in detail in the context of *Norfolk's* demographics and political system.[41]

Case law indicates that the concept of unusually large election districts refers to electoral areas larger than most cities, and certainly larger than Norfolk.[42] The evidence disclosed that Norfolk is the second most densely populated city in Virginia and one of the most densely populated in the South, a compactness which facilitates access to voters and door-to-door campaigning.[43]

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[41] (App. 42a-44a). Norfolk does *not* have a majority vote requirement, anti-single shot provisions or numbered posts (App. 71a-72a), any one of which would tend to increase head-to-head contests, thus, enhancing the difficulties faced by a minority candidate. *See Gingles, supra,* 590 F. Supp. at 363; *Nevett* v. *Sides, supra,* 571 F.2d at 217n.10 (5th Cir. 1978).

[42] In *Rogers* v. *Lodge, supra,* 458 U.S. at 627, Burke County, Georgia was two-thirds the size of Rhode Island and by its "sheer geographic size" made it more difficult to get to polling places and campaign for office. In *Brown* v. *Moore,* 428 F. Supp. 1123, 1142 (S.D. Ala. 1976), *aff'd,* 575 F.2d 298 (5th Cir. 1978), *vacated on other grds.*, 446 U.S. 236 (1980), Mobile County, 1240 square miles compared to Norfolk's 53, was found to be overly large.

[43] (Tr. 1960-1961). Petitioners' reference to campaign expenditures (Pet. 24 n.12) draws no nexus between size of the district and cost of campaigning nor between cost of campaigning and likelihood of success. In fact, the evidence disclosed that good organization and important endorsements such as CCN's allowed success at the polls at lower costs. For instance, Mrs. Howell in 1980, with CCN endorsement, spent only

Staggered terms have been criticized only when found in conjunction with other enhancing devices that inhibit a minority's ability to single-shot or which create head-to-head contests.[44] Such enhancement simply has not occurred in Norfolk's plurality-win system where a large number of candidates run for several seats. (App. 42a-43a). As both the District Court and Court of Appeals recognized, black candidates have been elected to City Council in years in which the least number of seats were available.[45] Clearly, the effect of staggered terms and any other factor must be considered on a case by case basis, and the analysis of the District Court was fully supported in the record. As the District Court found, a ward residency requirement in Norfolk could act like a numbered post requirement and encourage head-to-head contests.[46] Moreover, as the evidence showed, because of residential integration a ward residency requirement would not likely increase the number of black council members. (Tr. 1957).

$8,674 and won reelection (Ex. D-70). Conoly Phillips an incumbent spent approximately $68,000 in 1980 (in association with Joseph Leafe and Vincent Thomas), yet Mrs. Butts who raised and spent approximately $18,000 (Ex. D-77) received more votes.

[44] *See City of Rome* v. *United States, supra,* 446 U.S. at 183-184; *see also Jones* v. *City of Lubbock, supra,* 727 F.2d at 383.

[45] (App. 42a-43a; 5a, n.4). Petitioners misstate Dr. O'Rourke's testimony. (Pet. 24). While Dr. O'Rourke acknowledged that in some cases staggered terms could reduce the effectiveness of black voting, this effect has *not occurred* in *Norfolk* primarily because the large field of candidates splinters the white vote and reduces the percentage needed to win. (Tr. 1958-1960).

[46] (App. 43a). There is no concensus among the Courts as to whether residency requirements strengthen or dilute black voting strength. *Compare Rogers* v. *Lodge, supra,* 458 U.S. at 627, with *City of Rome* v. *United States, supra,* 446 U.S. at 185 n.21 (residency requirement "just like numbered posts . . . separates one contest into a number of individual contests") and *Perkins* v. *City of West Helena, supra,* 675 F.2d at 212 (8th Cir. 1982). *See United States* v. *Dallas County Comm., supra,* 739 F.2d at 1537.

4. Socioeconomic Disparities

This factor in the Senate Report is framed not in terms of whether there are simply "socioeconomic disparities" as Petitioners suggest, but rather whether such disparities "hinder [a minority group's] ability to participate effectively in the political process."[47] Voter registration and turnout have been the key measures by which black political participation under this factor has been analyzed.[48] The District Court found an existing but shrinking disparity in socioeconomic conditions between Norfolk's black and white citizens, yet it also found black political participation to be equal to or greater than white participation. Because black political participation was not depressed, Petitioners obviously could not show that any such socioeconomic disparities had a hindering effect. The District Court's findings were not clearly erroneous.

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE ELECTION OF A SECOND BLACK TO COUNCIL WAS NOT THE RESULT OF MANIPULATION BY WHITE POLITICIANS

The District Court considered Petitioners' assertion of "manipulation of the electoral process," made findings specifically on this point and its factual conclusions are

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[47] Senate Report, at 29. The footnote to this factor, *id.*, at 29 n. 114, notes that "where these conditions are shown *and where the level of black participation in politics is depressed*, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." (Emphasis added).

[48] *See Major* v. *Treen*, *supra*, 574 F.Supp. at 351 n.31. In *United States* v. *Marengo County Comm.*, *supra*, at 1568, the Eleventh Circuit noted that "[b]lacks still register and vote in significantly lower numbers than whites" as evidence of a nexus between socioeconomic disparities and lower participation.

certainly not clearly erroneous.[49] With the burden to prove manipulation of the election, Petitioners can point only to a news clipping quotation of Mayor Thomas which they believe support their position. (Pet. 25-26). While they assert that the District Court made "no findings" with regard to the Mayor's statement, they are simply incorrect. The District Court addressed the factual issue directly and rejected it.[50] The suggestion that the Mayor's comments or those by other candidates constituted racial campaign appeals[51] was thoroughly explored and rejected by

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[49] The issue, which was hardly pressed by Petitioners below, arises from a footnote in the Senate Report, to the factor considering "the extent to which members of the minority group have been elected to public office in the jurisdiction." The Senate Report at 29 n.115, makes clear that election of a minority candidate cannot be "conclusive proof" of access since if it were it would invite attempts to circumvent the Constitution and required "an independent consideration of the record".

[50] *See* App. 50a-51a. Petitioners single out Mayor Thomas' response to a reporter that "After the election, the issue of black representation may become a moot point" (Pet. 26). They fail to mention that Mayor Thomas explained that his decision not to run for reelection in 1984 was for personal reasons (Ex. P-11, p. 43) and not to moot this case (Ex. P-11, pp. 99-101). They also fail to mention that Mayor Thomas' support for a second black member on Council predated the lawsuit (Ex. P-11, p. 99).

[51] The *only* election alleged by Petitioners at trial and on appeal to contain racial campaign appeals was in 1982. Petitioners now dispute the District Court's *findings of fact* (Pet. 26) by citing out of context comments made by the Mayor and the candidates on the School Board's plan, a plan subsequently approved by the United States District Court and affirmed on appeal, to reduce cross town busing of elementary school children. *Riddick* v. *School Board, supra.* The District Court below addressed these allegations directly finding that the issue of busing was one of legitimate public concern, was addressed reluctantly by the candidates and often only when questioned about their stance and was "not intended to . . . or in fact," used to appeal to racial prejudice. (App. 48a-50a; Ex. D-40). Moreover, the evidence disclosed no such alleged appeals were reflected in voting patterns with the percentage of white voters supporting black candidates in 1982 rising ver previous elections. (Ex.D-470). Contrary to Petitioners' claim that

the District Court (App. 48a-50a; 74a-75a) which determination was affirmed by the Court of Appeals (App. 4a) and are subject to the clearly erroneous standard.

IV. THE DISTRICT COURT DID NOT IMPERMISSABLY WEIGH REMEDIAL CONCERNS WHEN REACHING ITS CONCLUSION ON THE LIABILITY ISSUE.

In their appeal to the Fourth Circuit, Petitioners argued that the District Court was biased against them (Appendix), which argument was rejected by the entire Fourth Circuit panel (App. 9a; 12a). The dissent, however, raised the argument that the District Court confused the proviso in Amended Section 2 with the remedy of wards and thought, therefore, that the District Court's decision on liability was "foreordained." (App. 12a). This argument of the dissent was specifically addressed and properly rejected by the panel majority which noted, "Thus, the district court, in contrast to the dissent's assertion, did not conclude, as a matter of law, that ward systems would be violations of that proviso but rather merely attempted to grapple with the interplay between the appellants' desired relief and a statutory prohibition."[52]

Indeed, the District Court commented on the issue of remedy at all only (a) because Petitioners at trial *urged* the District Court to consider remedy as a part of the liability determination, over the objection of Respondents (Tr. 661-665; Ex. P-52), and (b) in response to Petitioners' experts who framed their testimony in terms of the number of "black seats" to be "created" on council under their

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Mayor Thomas displayed a "customary penchant for racial campaign appeals," the facts disclosed that Mayor Thomas supported and gave financially to Reverend Green's campaign in 1982 and supported his appointment to Council in 1977. (Ex. P-11, pp. 35, 49). Again, the District Court's findings are not clearly erroneous.

[52] App. 9a,n.7. Based on the dissent's new theory, Petitioners raised this issue in their Petition for Rehearing which after briefing by both sides was rejected again by the Court of Appeals. (App. 82a).

various ward plans relative to their percentage of the population. (*See*, e.g. Tr. 451-455; 822) Nevertheless, the District Court's detailed opinion reveals no suggestion that its ruling was based on a belief that Petitioners' ward plans ran afoul of the proviso to Amended Section 2, and the Appellate Court's resolution of this argument was correct.

CONCLUSION

The District Court made that "intensely local appraisal" expressed in *White* v. *Regester*, of *all* of the Section 2 factors in light of the "totality of circumstances." Its detailed opinion comported with the requirements of Rule 52(a) and the decisions applying Section 2. The District Court's findings had substantial support in the record and by any measurement are not clearly erroneous. The Court of Appeals for the Fourth Circuit properly assessed the District Court's decision and there are no issues as to which the granting of a writ of certiorari is appropriate. Accordingly, the Petition should be denied without awaiting resolution by this Court of the issues raised in *Thornburg* v. *Gingles*.

Respectively submitted,

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APPENDIX

APPENDIX

The following is from the Brief for Plaintiffs - Appellants filed in the United States Court of Appeals for the Fourth Circuit on October 22, 1984:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial judge demonstrated such a prejudgment of the case and bias and hostility toward plaintiffs' case and the relief requested that plaintiffs were denied a fair trial before an impartial tribunal.

2. Whether the District Court's findings of fact lack the independent and detailed analysis of the evidence presented which is required by Rule 52(a), Fed.R.Civ.P., when the District Court's findings fail to consider or take note of substantial contrary evidence presented by the plaintiffs, and when large portions of the District Court's findings consist of paraphrased portions of the defendants' proposed findings of fact submitted after the trial.

3. Whether the District Court failed to apply the proper legal and factual standards mandated by Section 2 of the Voting Rights Act of 1965, as amended, in rejecting plaintiffs' claims of a Section 2 violation.

4. Whether the District Court's findings (a) that at-large city council elections in Norfolk do not deny black voters equal access to the political process and an equal opportunity to elect candidates of their choice, and (b) subsidiary findings of fact made in support of this conclusory finding, are "clearly erroneous" under Rule 52(a), Fed.R.Civ.P.

5. Whether the evidence compels a finding that at-large city council elections in Norfolk result in discrimination on the basis of race in violation of Section 2 of the Voting Rights Act.

Supreme Court, U.S.
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No. 85-1300

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OCTOBER TERM, 1985

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS

Page

I. Respondents' Argument in Support of the Decision Below that the Rule 52(a) "Clearly Erroneous" Standard Applies to Rulings on Questions of Law as Well as to Findings of Fact Conflicts with Controlling Decisions of this Court.... 1

II. Respondents' Contention that the Court of Appeals Considered and Rejected Petitioners' Claims of Legal Error Is Incorrect 4

Conclusion 10

TABLE OF AUTHORITIES

Cases

Anderson v. *City of Bessemer*, 84 L.Ed.2d 518 (1985) 2

Bose v. *Consumer's Union*, 466 U.S. 485 (1984).... 2

Inwood Laboratories v. *Ives Laboratories*, 456 U.S. 844 (1982) 2

Pullman-Standard v. *Swint*, 456 U.S. 273 (1982).... 2

Rogers v. *Lodge*, 458 U.S. 613 (1982) 2, 3

Velasquez v. *City of Abilene*, 725 F.2d 1017 (5th Cir. 1984) 2, 3

White v. *Regester*, 412 U.S. 755 (1973) 2, 3

Others

Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973 (1982) 2, 8

Rule 52(a), Fed. R. Civ. P. ..... *passim*

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982).... 2

H.R. Rep. No. 97-227, 97th Cong., 1st Sess. (1981) 2, 3

5A J. Moore & J. Lucas, Moore's Federal Practice (1985) 2

9 C. Wright & A. Miller, Federal Practice and Procedure (1971) 2

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REPLY BRIEF FOR PETITIONERS

I. RESPONDENTS' ARGUMENT IN SUPPORT OF THE DECISION BELOW THAT THE RULE 52(a) "CLEARLY ERRONEOUS" STANDARD APPLIES TO RULINGS ON QUESTIONS OF LAW AS WELL AS TO FINDINGS OF FACT CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT.

Even the most recent decisions of this Court maintain the historic distinction between the standard of appellate review governing trial courts' rulings on questions of law and trial courts' findings of fact. Rulings of law are subject to independent, plenary legal review by the appellate court and may reversed if they are in error; findings of

fact may not be set aside unless they are "clearly erroneous" within the meaning of Rule 52(a), which requires deference to the factual determinations of the trial court. *Anderson* v. *City of Bessemer*, 84 L.Ed.2d 518, 529 (1985); *Bose* v. *Consumer's Union*, 466 U.S. 485, 498 (1984); *Inwood Laboratories* v. *Ives Laboratories*, 456 U.S. 844, 855 n.15 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982); see, 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 52.03[2] (1985); C. Wright & A. Miller, Federal Practice and Procedure, Civil § 2588, at 750 (1971).

Respondents, in attempting to defend the Fourth Circuit's decision in this case, argue that this distinction should be ignored in cases brought pursuant to the 1982 amendment to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and rely on Section 2's "totality of the circumstances" standard, this Court's decisions in *Rogers* v. *Lodge*, 458 U.S. 613 (1982), and *White* v. *Regester*, 412 U.S. 755 (1973), and the Fifth Circuit's decision in *Velasquez* v. *City of Abilene*, 725 F.2d 1017 (5th Cir. 1984). Brief in Opposition, pp. 9-13. The argument is untenable and merely serves to underscore the necessity of granting review of the decision below.

There is nothing in the statutory language itself or in the legislative history of the statute which supports such a contention. Rather, the congressional purpose behind the statute shows just the opposite. In enacting Section 2, Congress decided to eliminate any requirement of proving discriminatory intent because of the frequently subjective nature of such a determination and because the intent standard "has created confusion as to the proof necessary to establish a violation." H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 28-29 (1981); S. Rep. No. 97-417, 97th Cong., 2d Sess. 36-37 (1982). Instead, Congress thought it preferable that the impact of a challenged voting practice should be assessed on the basis of "objective factors," S. Rep. No. 97-417, *supra*, at 27; H.R. Rep. No. 97-227,

supra, at 30, and provided a suggestive listing of such factors in the Senate report (pp. 28-29). Thus, contrary to respondents' argument, the legislative history of the statute shows that Congress was concerned that a determination of a statutory violation should not be left to the unfettered discretion of the trial courts, creating the danger of conflicting rulings on the same or similar proof, but rather should be based on "objective factors" which had been employed in prior cases to show whether or not the challenged practice denies minorities an equal opportunity to elect candidates of their choice.

Whether or not the trial court has properly defined these "objective factors" and has properly applied them to the facts of the case presents purely legal questions or, at most, mixed questions of law and fact, which should be subject to plenary review on appeal. Sweeping all of the trial court's rulings on these legal issues under the rubric of "findings of facts", thus denying appellants plenary review of the trial court's legal rulings, seriously undermines the congressional goals of objectivity and consistency in the application of the new statutory standard.

Similarly, none of the authorities upon which respondents rely support their position. *Rogers* v. *Lodge* was decided under the Fourteenth Amendment intent standard, rather than the new Section 2 "results" test. Contrary to respondents' argument (Brief, p. 10), *Rogers* does not hold that all of the trial court's rulings involve "pure questions of fact" governed by Rule 52(a); just before the passage quoted by respondents (p. 10 n.16) the Court undertook an extensive discussion of the appropriate legal standard and concluded that the District Court applied "the proper legal standard" (458 U.S. at 619-22). The passage quoted from *White* v. *Regester* deferring to the District Court's "intensely local appraisal" (Brief, p. 10) refers to the trial court's findings of fact, not to its legal rulings. Neither does *Velasquez* v. *City of Abilene* hold that the trial court's definition and application of Section

2's evidentiary factors are not subject to plenary appellate review.

Consequently, defendants' argument—and the Court of Appeals' decision—refusing to recognize the distinction between the different standards of review applicable to legal errors and factual errors fundamentally conflicts with controlling decisions of this Court and the legislative history of the 1982 amendment to Section 2 and is not supported by any applicable legal authority.

II. RESPONDENTS' CONTENTION THAT THE COURT OF APPEALS CONSIDERED AND REJECTED PETITIONERS' CLAIMS OF LEGAL ERROR IS INCORRECT.

Respondents' contention that the Court of Appeals considered, but rejected, petitioners' claims that the District Court applied improper legal standards in judging the factual proof in this case (Brief, p. 13) is manifestly incorrect and goes to the heart of this case. How could the Court of Appeals have reviewed petitioners' claimed legal errors in its short 3¼-page opinion when it failed to recognize that any errors of law were presented in the appeal [1] and reviewed all of the District Court's rulings under the Rule 52(a) "clearly erroneous" standard (768 F.2d at 573-76)?

Nowhere is this more evident than on the issue of racially polarized voting; respondents' argument that the District Court employed a proper legal standard in judg-

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[1] Respondents mischaracterize petitioners' arguments before the Fourth Circuit on appeal (Brief, pp. 6-7). Petitioners' contention that the District Court employed improper legal standards in assessing the evidence presented was a primary contention (Brief for Appellants, Herbert M. Collins, et al., 4th Cir., pp. 7, 16, 19-21, 27-30, 30-34, 37, 38-39, 43, 48-49; Reply Brief for Appellants pp. 6-9), as the dissenting opinion demonstrates, 768 F.2d at 578 ("the primary thesis of their appeal is the commission of errors of law.")

ing the evidence (Brief, pp. 13-19) is completely untenable. At trial, petitioners presented extensive evidence, by expert witness testimony and by statistical exhibits, showing a high degree of racially polarized voting in Norfolk City Council elections. This proof was essentially admitted to be correct by respondents (see Petition, p. 4); in their brief in the Court of Appeals respondents conceded: "The problem, however, was not so much with appellants' statistics as with the interpretation of those numbers" (Brief for Appellees, City of Norfolk, et al., p. 32). The enclosed tables, which are reproductions of exhibits admitted in evidence at trial, show a highly polarized electorate. Table 1, which shows the votes by

Table 1. Votes by Race of Voters for All Candidates by Race (Exhibit P-179).

Year	% white votes for:		% black votes for:		% of seats contested by blacks
	all whites	all blacks	all whites	all blacks	
1974	99.1	.9	50.5	49.5	75%
1976	91.8	8.2	58.9	41.7	67%
1978	94.0	6.0	67.5	32.5	20%
1980	98.2	1.8	33.0	67.0	67%
1982	89.7	10.3	6.7	93.3	100%
Average	94.6	5.4	43.2	56.8	

race of voters for all white and black candidates, shows that from 1974 to 1982 the percentage of white votes for all white candidates ranged from a low of 89.7 percent to 99.1 percent, with an average for all five elections of 94.6 percent. In contrast, white votes for all black candidates ranged from 0.9 percent to a high of only 10.3 percent, with an average for all five elections of only 5.4 percent of the white votes. Although few white votes went to black candidates, black votes went to both white and black candidates, although a majority of black votes went to black candidates in the last two elections.

Table 2 shows the correlations between the racial composition of the voting precincts (percent white in the voting age population of precincts) and the percentage of the votes for white candidates. On a scale of —1 (high negative correlation) to 0 (no correlation) to +1 (high positive correlation), all the correlations were above .9, "which is considered extremely strong in the social sciences" (Tr. 628, testimony of Kimball Brace).

Table 2. Correlations Between Percentage of Voting Age Population That Is White and Percentage of Votes for All White Candidates for City Council (Exhibit P-180).

Year	r	r^2
1974	.960	.921
1976	.978	.956
1978	.936	.876
1980	.981	.962
1982	.990	.980

Table 3 reports the regression analysis statistics for individual candidates and shows all of the candidates for city council seats (1974-1982) who were supported by more than 50 percent of the white voters. These figures

Table 3. White-Preferred Candidates, in Order of Percent White Support (Over 50 Percent) (Exhibit P-181).

Name	Race	Year	Elected?	White %	Black %
Staylor	W	82	E	82.1%	0.0%
Phillips	W	76	E	81.6%	0.0%
Thomas	W	76	E	81.0%	0.0%
Andrews	W	82	E	79.5%	0.8%
Summers	W	82	E	76.9%	0.0%
Staylor	W	78	E	73.7%	0.0%
Andrews	W	78	E	72.7%	35.4%
Thomas	W	80	E	71.2%	0.0%
Summers	W	78	E	68.2%	0.0%
Leafe	W	80	E	66.5%	0.0%
Staylor	W	74	E	66.0%	56.5%
Andrews	W	74	E	65.0%	9.4%
Middleton	W	78		64.4%	0.0%
Phillips	W	80		56.4%	0.0%
Summers	W	74	E	53.4%	4.1%
Total (15)	100% W		13/15 (86.7%)		
Average				70.6%	7.1%

demonstrate dramatically that, by and large, whites and blacks preferred different candidates for the Norfolk City Council. All of the candidates who were supported by more than 50 percent of the white voters were white, and all but four of them received few, if any, black votes. Only one white-preferred candidate, Claude Staylor in the 1974 election, got more than 50 percent of the black vote, but he lost his black support in subsequent elections (1982 and 1978) and was reelected with no black support. Almost all of the candidates who got more than 50 percent of the white vote were elected (only two of the 15 were defeated).

Table 4 lists all the candidates who were supported by more than 50 percent of the black voters. The statistics on this table show that the city council candidates who were most preferred by the black voters all received low percentages of white votes (except Staylor in 1974). The highest level of white cross-over voting for a black candidate was only 26.5 percent for Green in 1978 (respondents' figures calculated by a different method say 32.2 percent, but the difference is inconsequential).

Table 4. Black-Preferred Candidates, in Order of Percent Black Support (Over 50 Percent) (Exhibit P-184).

Name	Race	Year	Elected?	White %	Black %
Green	B	78	E	26.5%	100.0%
Jordan	B	76	E	20.3%	100.0%
Butts	B	80		5.5%	100.0%
Butts	B	82		6.4%	93.1%
Green	B	82	E	25.6%	92.0%
Bond	B	74		2.0%	82.5%
Hill	W	76		20.4%	80.5%
Hurst	W	76		22.4%	79.9%
Howell	W	80	E	33.5%	73.8%
Howell	W	78	E	27.3%	71.5%
Howell	W	74	E	33.2%	65.3%
Staylor	W	74	E	66.0%	56.5%
Total (12)	6W, 6B	7/12 (58.3%)			
Average				24.1%	82.9%

The figures on Table 3 show that under Norfolk's at-large election system, white voters can elect candidates of

their choice to the city council without any need for black support. In contrast, and contrary to respondents' assertion in their Brief (p. 5), the figures on Table 4 show that with at-large voting, black voters, by themselves, cannot elect any candidates—between 1974 and 1982 five candidates, black and white, who received 80 percent or more of the black vote were defeated (in the 1984 election, held after the case was tried and which is not on this table, Mrs. Butts got the votes of 75 percent of the black voters and lost).[2] In the three instances in which black candidates were elected, they won only because of the white votes which they received.

Altogether, these statistics show that black voters of Norfolk, in the words of Section 2, "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (42 U.S.C. § 1973(b)).

Despite this proof, the District Court concluded that "voting in Norfolk City Council elections is not racially polarized" (605 F. Supp. at 389). This conclusion was based on the District Court's definition of racially polarized voting, which required proof not only of voting patterns, but also of "white backlash" and "whites attempt to limit the field of candidates" (*id.* at 386).[3] Although

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[2] Respondents in their Brief assert that the Concerned Citizens of Norfolk, a black political group, play a "crucial role" in Norfolk politics. Yet the group was unsuccessful in three separate city council elections (1980, 1982, and 1984) in getting its co-chair, Mrs. Evelyn T. Butts (Brief in Opposition, p. 3 n.5), elected to the Norfolk City Council, which belies respondents' assertions that the group plays a "crucial role" and "wields considerable clout" (Brief, p. 3).

[3] The District Court also distorts the testimony of Dr. Timothy O'Rourke, respondents' expert witness, on this issue. Dr. O'Rourke merely "suggested that three factors must be examined" (605 F. Supp. at 386); the District Court itself translated Dr. O'Rourke's suggestion into "Dr. O'Rourke's definition in determining whether the Norfolk City Council elections may be characterized as racially polarized" (*id.*).

petitioners in their Fourth Circuit appeal contended that this definition is contrary to precedent and engrafted onto the accepted definition of racially polarized voting the need to produce proof of an intent to abridge minority voting rights (768 F.2d at 578, Butzner, J., dissenting), the Fourth Circuit panel majority inexplicably failed to discuss this issue *at all* in its opinion.

The treatment of the racial bloc voting issue by the lower courts in this case points up the necessity of maintaining the traditional distinction in the standards of appellate review between legal determinations and findings of fact. The District Court's definition of racially polarized voting was essentially a legal determination which it applied to the facts of this case. The Fourth Circuit, by refusing to subject that legal conclusion to plenary appellate review, denied petitioners effective appellate review of the District Court's ruling on this issue.

Respondents in their Brief in Opposition attempt to defend the District Court's ruling with selective citations and quotations from a number of cases (Brief, pp. 17-19), none of which were cited on this issue or discussed by the Court of Appeals or by the District Court. Respondents' reliance on these cases simply emphasizes that the proper definition of racially polarized voting presents an important legal issue which should have been addressed by the Court of Appeals in this case, but was not. Contrary to respondents' assertions, in none of the cases cited were proof of "white backlash" and "whites attempt to limit the field of candidates" considered to be elements of the definition of racially polarized voting. The District Court's definition of racially polarized voting is erroneous as a matter of law and should be reversed.

CONCLUSION

For the above-stated reasons, and for the reasons stated in the Petition for a Writ of Certiorari, this Court should grant the writ to review the decision below or, alternatively, defer ruling on this Petition pending a decision in *Thornburg* v. *Gingles*, No. 83-1968.

Respectfully submitted,

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